American Bar Association Journal

August 1951

VOLUME 37 • NUMBER 8

Contents

AUGUST, 1951

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois. Entered as second class matter Aug. 25, 1920, at the Post Office at Chicago, Ill., under the act of Aug. 24, 1912.
Price per copy 75c; to Members, 50c; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00; to Members of the American Law Student Association, $1.50. Vol. 37, No. 8. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are sixteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of thirty-six, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $12.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $3.00 per year, and for three years thereafter $6.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. The dues for all other Sections are $3.00 a year, with the exception of the Section of Taxation, which are $6.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

Officers and Board of Governors, 1950-1951

President CODY FOWLER, Citizens Building, Tampa 2, Florida
Chairman, House of Delegates, ROY E. WILLY, Security National Bank Building, Sioux Falls, South Dakota
Secretary JOSEPH D. STECHER, Toledo Trust Building, Toledo 4, Ohio
Treasurer HAROLD H. BREDELL, Consolidated Building, Indianapolis 4, Indiana
Executive Secretary OLIVE G. RICKER, 1140 N. Dearborn Street, Chicago 10, Illinois.

Ex Officio
- The President,
- The Chairman of the House of Delegates,
- The Secretary,
- The Treasurer,
- HAROLD J. GALLAGHER, Last Retiring President, 15 Broad Street, New York 5, New York
- TAPPAN GREGORY, *Editor-in-Chief,* American Bar Association Journal, 105 South LaSalle Street, Chicago 3, Illinois

First Circuit	ROBERT W. UPTON, 14 Park Street, Concord, New Hampshire	*Sixth Circuit*	GEORGE E. BRAND, Cadillac Tower, Detroit 26, Michigan
Second Circuit	E. J. DIMOCK, 165 Broadway, New York 6, New York	*Seventh Circuit*	ALBERT J. HARNO, University of Illinois Law School, Urbana, Illinois
Third Circuit	WILLIAM W. EVANS, 129 Market Street, Paterson 1, New Jersey	*Eighth Circuit*	FREDERIC M. MILLER, Bankers Trust Building, Des Moines 9, Iowa
Fourth Circuit	WALTER M. BASTIAN, United States District Court for the District of Columbia, Washington 1, D. C.	*Ninth Circuit*	SIDNEY TEISER, Equitable Building, Portland 4, Oregon
Fifth Circuit	ROBERT G. STOREY, Republic Bank Building, Dallas 1, Texas	*Tenth Circuit*	ALVIN RICHARDS, Pure Oil Company, Tulsa 3, Oklahoma

Board of Editors, American Bar Association Journal, listed on page 596

Advisory Board of the Journal

HOWARD L. BARKDULL	Cleveland, Ohio	LANNEAU D. LIDE	Marion, South Carolina
JOSEPH F. BERRY	Hartford, Connecticut	EDWIN LUECKE	Wichita Falls, Texas
ALBERT E. BLASHFIELD	Ann Arbor, Michigan	HAROLD R. McKINNON	San Francisco, California
CLARENCE M. BOTTS	Albuquerque, New Mexico	GEORGE M. MORRIS	Washington, D. C.
CHARLES H. BURTON	Washington, D. C.	BEN W. PALMER	Minneapolis, Minnesota
FREDERIC R. COUDERT	New York, New York	ORIE L. PHILLIPS	Denver, Colorado
CHARLES P. CURTIS	Boston, Massachusetts	ARTHUR G. POWELL	Atlanta, Georgia
CLARENCE A. DAVIS	Lincoln, Nebraska	CARL B. RIX	Milwaukee, Wisconsin
DEANE C. DAVIS	Montpelier, Vermont	CLEMENT F. ROBINSON	Portland, Maine
WM. TUCKER DEAN, JR.	New York, New York	PEARCE C. RODEY	Albuquerque, New Mexico
SAM T. DELL, JR.	Gainesville, Florida	GEORGE ROSSMAN	Salem, Oregon
FORREST C. DONNELL	St. Louis, Missouri	PAUL SAYRE	Iowa City, Iowa
CHARLES E. DUNBAR, JR.	New Orleans, Louisiana	NAT SCHMULOWITZ	San Francisco, California
CHARLES R. FELLOWS	Tulsa, Oklahoma	JAMES C. SHEPPARD	Los Angeles, California
HENRY S. FRASER	Syracuse, New York	SYLVESTER C. SMITH, JR.	Newark, New Jersey
CHARLOTTE E. GAUER	Chicago, Illinois	W. EUGENE STANLEY	Wichita, Kansas
THOMAS B. GAY	Richmond, Virginia	ROBERT S. STEVENS	Ithaca, New York
FARNHAM P. GRIFFITHS	San Francisco, California	WILLIAM E. STEVENSON	Oberlin, Ohio
FRANK W. GRINNELL	Boston, Massachusetts	PHIL STONE	Oxford, Mississippi
ERWIN N. GRISWOLD	Cambridge, Massachusetts	WESLEY A. STURGES	New Haven, Connecticut
ALBERT J. HARNO	Urbana, Illinois	LANE SUMMERS	Seattle, Washington
FRANK C. HAYMOND	Charleston, West Virginia	JOHN E. TARRANT	Louisville, Kentucky
JOSEPH W. HENDERSON	Philadelphia, Pennsylvania	ROBERT B. TUNSTALL	Norfolk, Virginia
FRANK E. HOLMAN	Seattle, Washington	WALDEMAR Q. VAN COTT	Salt Lake City, Utah
FRANCIS H. INGE	Mobile, Alabama	EARL WARREN	Sacramento, California
WILLIAM J. JAMESON	Billings, Montana	ROBERT N. WILKIN	Cleveland, Ohio
WILLIAM T. JOYNER	Raleigh, North Carolina	CHARLES H. WOODS	Tucson, Arizona
JACOB M. LASHLY	St. Louis, Missouri	LOYD WRIGHT	Los Angeles, California
BOLITHA J. LAWS	Washington, D. C.	LOUIS E. WYMAN	Manchester, N. H.

James Madison:

His Greatness Emerges After Two Centuries

by Irving Brant

▪ This year marks the two-hundredth anniversary of the birth of James Madison, the Father of the Constitution and the fourth President of the United States. Mr. Brant writes that Madison's true greatness has been obscured for many years and that it is only in recent decades that the extent of his contribution to American history has begun to be recognized. There is an "extraordinary relationship between his major work and the main currents of American politics and law", Mr. Brant declares, and, as the main architect of the Constitution, Madison's concept of government and his political ideals bring him into the foreground today where the problems of the mid-twentieth century revolve around the Constitution in whose drafting he played so important a role.

▪ On the two-hundredth anniversary of his birth, James Madison is emerging from a long eclipse into which he was thrown by a combination of personalities and events. The personalities include his own, and the events include some in which he had a directing hand.

Internationally, Madison was at the peak of his fame in 1787, the year in which he chiefly earned (though he did not then receive) the title of Father of the Constitution. His European renown had nothing to do with that. It was the result of an article in the newly published *Encyclopédie Méthodique* characterizing him as "Mr. Madisson, who at the age of thirty astonished the new republics with his eloquence, his wisdom and his genius". This caused such a flood of demands for letters of introduction that the American minister to France, Thomas Jefferson, arranged a code by which Madison was told which visitors were really entitled to his attention.

Owing to the secrecy surrounding the Constitutional Convention, Madison's leadership in its work was known only to its members, though after adjournment they spread it around a little in talk and letters. In the new Congress, in 1789, he was the universally recognized leader of administration forces. There was even some complaint that he affected to manage President Washington. "He is our first man", wrote his chief opponent, Fisher Ames. In the following January, Madison broke with Alexander Hamilton over the funding of the public debt. He split Congress on this issue and became leader of the opposition to the Washington administration—all this before Jefferson, returning from France, had taken his place in the cabinet as Secretary of State.

This was the one period of Madison's life in which he had a strong popular political following. "Happy there is a Madison who fearless of the blood suckers will step forward and boldly vindicate the rights of the widows and orphans, the original creditors and the war worn soldiers", wrote a Revolutionary veteran in a Boston newspaper. This exclamatory praise was applied at a time and to the events which produced what we know today as Jeffersonian Democracy. Three or four years later, when party lines had taken definite form, Federalist Fisher Ames was still calling the anti-Administration forces in Congress "the Madisonians", and he wrote in January 1793: "Virginia moves in a solid column, and the discipline of the party is as severe as the Prussian. Deserters are not spared. Madison is become a desperate party leader and I am not sure of his stopping at any ordinary point of extremity."

There was a hint of this same estimate in a letter written by French Minister Fauchet to his government in 1794, at a time when American public opinion was split asunder by sympathy for or opposition to the French Revolution. Declaring that the Federalist leaders had plunged the whole nation into a speculative debauch, Fauchet named three honest patriots—Jefferson, the late Secretary of State; Monroe, the new minister to France; and "Mr. Madison, the Robespierre of the United States".

For the shift to Jeffersonian leadership there were many reasons, but as far as the public was concerned,

the sharp initial impetus came from Hamilton. Facing Jefferson in the Cabinet, the Secretary of the Treasury sensed his political glamour and the uncompromising drive of his democratic ideas. Also, struggling with him in this arena for influence upon presidential decisions, Hamilton looked upon the Cabinet, rather than Congress, as the center of the conflict. So, in 1792, under half a dozen transparent journalistic aliases, he launched a bitter propaganda war against Jefferson in the newspapers and thus helped to build him up as Republican leader and prospective candidate for the Presidency. It was a logical process, for Jefferson was endowed with qualities that made men idolize or hate him. He made no speeches and wrote nothing for the press, but an angel or a devil (depending on how you looked at it) touched his pen whenever he scribbled a political note and the recipient of it sometimes felt an overwhelming impulse to share it with his neighbors or with all the world. For a man who yearned for privacy, Jefferson had a remarkable genius for avoiding it.

Madison's Letters Ignore His Own Part in Revolution

Madison held state or federal public office continuously from 1776 to 1817, with the exception of a few months in 1777 and three of the years between 1797 and 1801. He was one of the most prolific letter writers of his day and his correspondence, up to the time he became absorbed in executive duties in 1801, virtually tells the history of the Revolutionary and post-Revolutionary eras. It does so save for one matter. His own share is buried and ignored. If, in the Continental Congress, he wrote a committee report of vital importance, his letters tell all about it except the authorship. That has to be dug out of the Journals or unpublished papers. The same is true of his career in the Federal House of Representatives, though by this time the newspapers began to supply the deficit, as in the nationwide storm in 1794 over "Mr. Madison's Resolutions"—retaliatory proposals to check foreign discrimination against American shipping.

During eight years as Secretary of State under President Jefferson, Madison completely buried both his initiative in international affairs and the influence he exerted in their development. As President, he wrote the important diplomatic letters signed by an incompetent Secretary of State who had been forced on him by senatorial politics and gave only a hint of the truth during the uproar that ensued when he fired this cabinet member. Even during the three decades of leisure which followed his retirement, he made no effort to build himself up for posterity, unless that term can be applied to his correction of an erroneous division of the *Federalist Papers* between himself and Hamilton. The work which revealed the greatness of his contribution to the making of the Constitution—his record of debates in the Federal Convention of 1787—was not published until after his death, and is notably free of any emphasis upon his own speeches in comparison with those of his associates.

Jefferson Has Overshadowed Madison's Role in History

In the long perspective of history, there has been a more potent reason than his own modesty for underestimation of Madison. Both during his sixteen years as Secretary of State and President, and after the period of veneration in his old age, he was caught between two minimizing forces. The flaming admirers of Jefferson treated him as a disciple rather than a builder of Jeffersonian Democracy, while the opponents of that political order both included and subordinated him in the scorn and hatred they felt for its principles and its titular leader. This has been as true of most historical writers as it was when Federalist congressmen, editors and preachers laid down their barrages on the field of battle.

The gradual emergence of Madison in recent decades has been due to qualities in his work rather than in his person. But this would not have built or rebuilt his fame except for the extraordinary relationship between his major work and the main currents of American politics and law.

Having written a Constitution which divided the powers of government between nation and states, with the dividing line somewhat nebulous, the Framers of it looked forward to some years of disputed interpretation, after which, with its meaning definitely fixed, public affairs would be administered with certainty and precision. Even if it had worked out that way, the fact that the Constitution was a written document would have forced a constant recourse to its wording. That necessity was multiplied many fold by two unforeseen or only dimly anticipated facts. First, some of the enumerated powers were so worded as to be capable of almost indefinite expansion in themselves or in their effect on other clauses. Second, the technological revolution on which the world was entering required a vast expansion of federal authority, to which a heightening sense of nationhood gave fundamental support, but which also involved fierce and continuous conflicts growing out of economic interest, social outlook or political views. Constitutional interpretation became a weapon with which the opposing sides battered each other.

Along with this there has been a steadily intensifying struggle over American civil liberties. This has resulted in a general building up of the principle of equality among men, offset just now by a loss of freedom of political expression (a reflection of the present state of the world), by a decay in the understanding and defense of personal liberty in general and by an extraordinary abuse of congressional immunity from the laws of libel.

Every one of these developments brings Madison into the foreground of modern thought. He was the main architect of the Constitution, around which most of the public debates are made to revolve. He was the first

American to realize the fundamental significance of class and sectional conflicts over property, occupations, social position, wealth, poverty, religion, personal ambition, as causes of faction in government. His main thought in outlining a new constitution was to control these demoralizing forces without sacrificing the democratic principle of self-government and without cutting the legislative or executive power below its responsibilities. Finally, as the author of the first Ten Amendments to the Constitution, he played a leading part in defining and securing the freedom of the individual.

Madison's description in the tenth *Federalist* of conflicts over property, as an impelling cause of faction in government, has become a classic. Aided by failure to notice that he listed other factors than property, it has caused him to be regarded by many as a pre-Marxian teacher of economic determinism. Today, with the causes of political faction well established, there is more need to observe the conclusions about government which Madison drew from these premises, *when he first discussed the subject in the Constitutional Convention.* Noting the division of civilized societies into rich and poor, debtors and creditors, merchants and farmers, rival regions and conflicting religious sects, he asserted that oppression from these causes was a characteristic of small states. Could this be cured without abandoning the republican form of government? He told the Convention it could be:

> The only remedy is to *enlarge the sphere*, and thereby divide the community into so great a number of interests and parties, that in the first place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the second place, that in case they should have such an interest, they may not be apt to unite in the pursuit of it.

This, Madison asserted, is "the only defense against the inconveniences of democracy consistent with the democratic form of government". It was on this basis, and not through the sacrifice of representative democracy, that Madison led a convention of property owners to frame a constitution for the protection of both persons and property. With the national government restrained by the conflicting interests of sections and classes, and with the individual states looking after local matters, liberty would be safe and federal power need not be feared. *The larger the territory thus safeguarded, the safer everybody would be.*

Here may be found the reason why the Federal Convention so readily implanted national supremacy in the Constitution, and why the restraints found in it, for the special protection of property, are directed against the states but not against Congress. Government in the large sphere could be trusted; in the small sphere it must be restrained. That conclusion, of course, may be violently assailed, and it is subject to collateral attack by those who see more harm in the inefficiency of our Government than good in the check imposed on majority power. But it is the rock-bottom principle on which the Constitution is built and the translation of it into the substance of government is Madison's chief contribution to his country. Once this basic fact is understood, four great delusions fade away—that the framers of the Constitution were opposed to democratic self-government, that they feared a strong federal government, that they were devoted to state rights, and finally, the delusion that they shaped the Federal Government to serve their own selfish property interests.

Federal Bill of Rights Not Strict Necessity in Madison's View

The move by Madison in Congress to place a bill of rights in the Constitution was due more to the general demand for it than to his own belief that it was necessary. Omission of it had not worried him, but when he saw that this endangered ratification by Virginia, he insured victory by giving a pledge to work for amendments.

Madison's original reluctance was not due to indifference. He regarded religious liberty as the basis of all

Irving Brant, whose four-volume biography of Madison (three volumes so far published) has gained him recognition as one of the foremost students of the Revolutionary era, was born in Iowa. He is a graduate of the University of Iowa and has been a newspaper editor and editorial writer in Des Moines, St. Louis and Chicago. He is the author of several books dealing with current problems as well as of his biography of the fourth President, the latest volume of which covers the framing of the Constitution. (This sketch of Mr. Brant was drawn by his artist-daughter, Robin, especially for the *Journal.*)

freedom and freedom of conscience as the basis of religious liberty. In 1776, when Virginia's Declaration of Rights was up for adoption, 25-year-old Madison secured an amendment which converted toleration of religious dissent into a complete guarantee of the rights of conscience. This was followed by virtual disestablishment of the Episcopal Church through repeal of the tithe law. Then, in 1784, came Patrick Henry's effort to restore financial support by including all Christian sects. Madison led the fight against this "Bill establishing a provision for teachers of the Christian religion", and defeated it through the terrific impact of his "Memorial and Remonstrance Against Religious Assessments".

In this memorial, he took the position that religion was totally outside the purview of governmental

authority. The Virginia Declaration of Rights guaranteed freedom of conscience and that guarantee was violated when people were taxed for the support of religion. Henry's bill was dropped without being brought to a vote, but Madison saw that without this upsurge of public sentiment against it, a legislative majority would have forced it on the people in defiance of the state constitution.

So when the issue came before him in the national field, he felt the force of several restraining conclusions: First, a federal establishment of religion was banned by the laws of nature and by the limited scope of the enumerated powers of Congress. Second, it would be difficult to secure a broad enough guarantee of religious freedom. Third, bills of rights in general were of little avail when they ran contrary to the will of a passionate majority. On the other side, he saw that the "necessary and proper" clause of the Constitution created a hazard. General warrants, if not specifically banned, might be authorized by Congress as a means of enforcing the collection of revenue, though a law authorizing general warrents would be unnecessary and improper in itself. Also, guarantees of freedom when planted in a constitution would in time become axioms of good government and thus serve as a rallying point for public opinion.

The balance of arguments merely made him willing to accept the Constitution without specific guarantees. "My own opinion", he wrote in reply to Jefferson's appeal for them, "has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration". Entrusted with fulfillment of a promise to implant one, he threw himself into the task of making it as broad and firm as possible.

Madison Intended the Bill of Rights To Ban Any Form of State Religion

In drafting the Bill of Rights, Madison as might be expected paid the keenest attention to the clause on religious liberty. That he intended it to ban every form of religious establishment, particularly the financial support of religion, is made evident in his "Essay on Monopolies"[1] and he left no doubt of it when he vetoed an act of Congress in 1811 because it called for "the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment' ". A bit of evidence sometimes cited to the contrary—the published statement of eight Virginia state senators that they defeated ratification of the First Amendment because it did not forbid tax support of religion—is exposed in the correspondence of Madison and Hardin Burnley as a treacherous attempt to turn the Baptists of Virginia against this amendment, in order that the failure of it might reopen the way in Congress to an amendment repealing the power of direct taxation.

On another subject of controversial import in the mid-twentieth century, Madison put himself no less definitely on record. When Congress undertook in 1794 to pass a resolution condemning the Democratic Societies of the United States (societies friendly to the French Revolution) Madison denounced this as invading the reserved rights of the people.

"Opinions", he said on the floor of the House, "are not the objects of legislation. . . . It is in vain to say that this indiscriminate censure is no punishment. . . . Is not this proposition, if voted, a bill of attainder?"

He then laid down a basic principle:

"If we advert to the nature of republican government, we shall find that the censorial power is in the people over the government, and not in the government over the people."

With this in the background, one can realize the shock Madison received—and Jefferson no less—upon the passage of the Alien and Sedition Acts four years later. The failure of the courts to uphold the Bill of Rights led Madison part way and Jefferson considerably farther into the doctrine of a restraining power in the states over unconstitutional legislation. When their Virginia and Kentucky Resolutions were employed thirty years later as buttresses of the nullification doctrine, the aged Madison rallied to the defense of the Constitution. He made it plain that his doctrine of 1798 was being perverted, but in pulling it back to its proper confines he still left it as an aberration in his political thinking rather than a valid part of his philosophy of government.

This was no less true of Madison's general shift, after his break with Hamilton, to a strict interpretation of the Constitution, and toward a narrowing of the broad powers he had helped to place in it. These are human failings which seem out of place only in a person of extraordinary mental powers and balance. It is when one uncovers the broad and sane nationalism of his years as a constitution builder and ties that in with his lifelong patriotism, honesty and devotion to liberty, that it becomes possible to measure his contribution to his country. His ultimate place in history will depend less on the writings of historians than on the character of the American people. It takes greatness in a people to recognize the kind of greatness that was in James Madison.

1. Published in *William and Mary Quarterly*, October, 1946.

The Convention on Freedom of Information:

A Threat to Freedom of Speech in America

by **Frank E. Holman** • of the Washington Bar (Seattle)

■ The Convention on Freedom of Information, adopted by a committee appointed by the General Assembly on February 5, 1951, has now been reported to the Economic and Social Council. Mr. Holman says that this Convention was drafted by a committee a large portion of whose membership came from countries in which the concept of freedom of speech is vastly different from that embodied in the Bill of Rights—that adoption of such a treaty by the United States would be a complete reversal of the American concepts. The article is taken from a speech delivered at the dedication of the Southwestern Legal Foundation in April.

■ More than two years ago at the Mid-Year meeting of the American Bar Association in Chicago, I pointed out that under the general language of the United Nations Charter with regard to "human rights" certain pressure groups in this country and elsewhere were proposing by and through a so-called International "Bill of Rights" program to establish uniformity in basic rights for all the peoples of the world. I further pointed out that uniformity could not be achieved without compromising and leveling out American basic rights as fixed by our Constitution and Bill of Rights. It also seemed clear to me at that time, and it has since been confirmed by several court decisions (of which I shall speak later), that we were approaching a new development in law making whereby through "treaty law" the normal legislative processes in this country both of the Congress and of our state legislatures would be by-passed through international agreements ratified as treaties and that through such treaties the established law in the United States would be changed or nullified without the people generally knowing anything about it. However, I did not suppose at that time that these pressure groups would be so bold as to try to undermine and destroy the American concept of freedom of speech and of press as fixed by our Bill of Rights.

By what I say today I do not want to give the impression that I am opposed to the United Nations as such, or to its basic purpose of attempting to achieve world peace by and through an international co-operative security organization, although to date more effort seems to have been devoted to reforming the world socially and economically than to achieving world peace.

When the United Nations was organized in San Francisco in 1945, there was included in the Charter (Article 2, Subparagraph 7) a proviso as follows:

> Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter.

You will note that this is a specific provision and that under it nothing contained in the Charter should be construed as authorizing any interference by the United Nations or its agencies in the domestic affairs of a member state—hence, in the domestic law of a member state. Without such a proviso the Charter would certainly not have been approved by the American people or ratified by the United States Senate and it would not in all probability have been approved by many of the other important countries of the world. Therefore, it seems clear that when any agency of the United Nations, by "treaty law", undertakes to change or modify any long established principle or concept of law affecting basic American rights, there is a violation of the restriction and safeguard set forth in the proviso just quoted and that in calling attention to such a situation one cannot validly be charged with opposing the United Nations and its efforts to achieve peace as a co-operative security organization for the maintenance of peace against aggression.

I recognize that the Charter (Article 62, Paragraph 2) contains broad language empowering the Economic and Social Council "to make recommendations for the purpose of promoting respect for, and observance

of, human rights and fundamental freedoms for all". But this general language is controlled and limited by the specific language of the proviso already mentioned, and neither the Economic and Social Council nor any other agency of the United Nations is empowered by such general language, through a so-called International "Bill of Rights" program or otherwise, to make domestic law for the people of the United States or to nullify domestic law as already established in the United States and in the several states by our normal legislative and judicial processes.

I have thought it important to mention and explain the foregoing provisions of the Charter so that no one will misunderstand my attitude toward the United Nations for at times I have been misquoted with respect to this matter.

Human Rights Commission Fails in Drafting Free-Press Treaty

While the Human Rights Commission had been at work on a Covenant on Human Rights, two other commissions of the United Nations had been struggling directly with a proposed international code of freedom of speech and freedom of information (freedom of the press) in an attempt to work out (a) an international news gathering treaty, and (b) an international freedom of information treaty. A draft of the so-called "news gathering" convention was released early in the summer of 1950 as a kind of code of international ethics for the gathering and transmission of news. But no success was achieved in drawing an independent convention on freedom of information and this matter was then referred to the Human Rights Commission with the result that instead of having a separate convention on freedom of speech and freedom of press, there were included in the last draft of the so-called Covenant on Human Rights certain paragraphs affecting these freedoms as well as certain paragraphs affecting freedom of religion, freedom of assembly and freedom of petition. When this so-called Covenant on Human Rights, containing these paragraphs, was released in June of last year, it was expected that it would be submitted to and passed by the General Assembly in its September session of 1950 and that the whole "package" would be submitted to the member states, among others to the United States, for ratification as a binding treaty. It then developed in August that certain of the Communist and Socialist nations were dissatisfied with the Covenant because it failed to include social and economic rights as set forth in the Declaration and, this matter still being unsettled, the Covenant has not been submitted to the Assembly for final approval. It has been rereferred to the Human Rights Commission with instructions to consider the inclusion of social and economic rights such as are referred to in the Declaration.

Last December another effort was launched to draft a separate Convention on Freedom of Information, when the General Assembly appointed a new committee for that purpose to report to this (1951) summer session of the Economic and Social Council. The majority of the members of this new committee of fifteen come from countries where there is little knowledge or appreciation of our concept of freedom of speech and of press—Cuba, Ecuador, Egypt, India, Lebanon, Pakistan, Saudi Arabia and the U.S.S.R. As in Mrs. Roosevelt's original Commission on Human Rights, nothing but a compromise and leveling out of basic American concepts can possibly emerge from the deliberations of such an international group. One needs only to read the committee debates during January of this year to confirm this conclusion. A draft Convention, including a preamble and nineteen articles, was adopted by this committee on February 5, 1951. As heretofore stated, the committee does not make its formal report to the Economic and Social Council until this summer. Meanwhile, the text of the Convention is being circulated among the various governments for comment.

An examination of the text discloses it to be an international compromise so far as American concepts of freedom of speech and of press are concerned. The preamble is a noble generalization of the importance and significance of freedom of information. The article of most importance (Article 2) is that of the limitations that may be placed by law upon freedom of information. This article imposes nine limitations and these are to be "clearly defined by law and applied in accordance with law". These limitations on freedom of speech and of press include such as may be deemed necessary by the authorities in power in a given country for the protection of national security; the prevention of incitement to overthrow the government by violence; the prevention of disorder, incitement to criminal acts, obscene expressions dangerous to youth, expressions injurious to the fair conduct of legal proceedings, infringement of literary and artistic rights, defamation of reputations and prevention of fraud and of the disclosure of information received in confidence in a professional or official capacity. At first glance these items of specifications may seem appropriate enough in themselves, but the danger lies in what may be attempted by a particular regime in passing laws under the permissive language of such limitations —for instance, almost any law restricting freedom of speech and of press could be justified by a dictator under such general phrase as "protection of national security".

It is interesting to note that the final vote of the committee on Article 2 of the Convention was seven in favor and two against (U.S. and U.S.S.R.) with five abstentions. The reason why the United States voted against Article 2 is that it favors the more general text of limitations which appear in Article 14 of the Covenant on Human Rights instead of the more specific text of Article 2 of the Convention.

Until the new draft of the Convention is acted upon by the Economic and Social Council this summer, no

one quite knows what its final form will be. Since the present provisions in the Covenant on Human Rights have the approval of our State Department and rather general support in the United Nations Assembly, we will analyze their content and language as to our basic concept of freedom of speech and of press. Before doing so, however, we should inquire, "What is the basic American concept of freedom of speech and press?"

Our wise forefathers knew that the mind and the spirit of man could not be controlled and regimented by government or by the officers of government for the time being in power so long as freedom of speech and of press were preserved. This fact was so fully understood and realized by the drafters of our Constitution and our Bill of Rights that, although Congress was given power to legislate on many matters, it was denied the power to pass any law abridging freedom of religion or freedom of speech or of press. The first provision of our Bill of Rights reads as follows:

> Congress shall make *no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Free Speech Recognized as Essential in Constitution

Under our American concept of freedom of speech and of press, the only restriction that the law has imposed or can impose is where a particular court believes that in a specific case there has been a flagrant abuse of one of these freedoms. As Mr. Justice Holmes once said, in effect, "free speech would not protect a man in falsely shouting 'fire' in a theater and causing a panic—the question in each case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger." In other words, except for certain common law limitations such as slander and libel and such judicial limitations as Mr. Justice Holmes suggests, our forefathers recognized that "freedom of speech and of press" were so precious and so necessary to the continuation of our other freedoms under a free government that they specifically provided in the very first provision of the Bill of Rights that Congress should pass *no law* abridging freedom of speech or of press. This basic concept has now been flaunted and repudiated by the present provisions of the proposed International Covenant on Human Rights. Paragraph 2, Article 14, of the Covenant first broadly provides:

> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

But then follows paragraph 3:

> 3. The right to seek, receive and impart information and ideas, carries with it special duties and responsibilities and may therefore be subject to certain penalties, liabilities, and restrictions, but these shall be such *only as are provided by law* and are necessary for the protection of national security, public order, safety, health or morals, or of the rights, freedoms or reputations of others.

You will immediately note that in Paragraph 3 the right to seek, receive and impart imformation and ideas is subject to such penalties, liabilities and restrictions as are provided by law and are necessary for the protection of national security, public order, safety, health or morals, or of the rights, freedoms or reputations of others. National security, public order, safety, health and morals constitute the whole gamut of human activities and human relationships; so that under this language any administration in power with a majority vote in the Congress could provide by law such restriction or abridgment of freedom of speech or of press as it asserted were necessary.

But this is not all. Under an earlier article, Article 2 of the Covenant, it is provided that "in the case of a state of emergency officially proclaimed by the authorities or in the case of public disaster, a state may take measures derogating from its obligations" to preserve freedom of speech and of press and derogating from other freedoms like the right of peaceable assembly and the right to petition. In other words, the whole right to freedom of speech and of press may be suspended by a state of emergency officially declared by the authorities in power. Well, we have lived in a state of officially declared emergencies frequently during the last twenty years and are still doing so. We had all our banks closed by a decree of a President. In the same way a President, by declaring a state of emergency as provided in the Covenant, could close all the newspapers in the United States, or such of those and in such places as he thought it wise to close. This proviso in Article 2 ratifies and approves the practice that has been followed in dictatorships from earliest times of suppressing by executive decree the freedoms which in our country, under our own Bill of Rights, are not subject to suppression. Under

Frank E. Holman, President of the American Bar Association, 1948-49, is a member of the Seattle Bar. He received his education at the University of Utah and was dean of its law school in 1913-15. He served as a member of the Committee To Report as to Proposals for the Organization of the Nations for Peace and Law, 1945-46, and was a member of the Committee on Peace and Law Through United Nations, 1946-48, and Advisory Counselor to the Committee, 1949-50.

this provision in an international treaty we could no longer complain or point the finger at Stalin and the Politburo or at Mr. Franco in Spain or Mr. Perón in Argentina for closing the newspapers by executive decree on the basis of a "declared emergency".

The same argument is now being put forth by the State Department with respect to this complete negation of the American concept of freedom of speech and of press as was put forth in the case of the Declaration of Human Rights and the Genocide Convention—that it is difficult to get agreement among fifty-eight or more nations and to bring them to a common point of view without compromising some of our basic American concepts. But it is hard to reconcile this position of the State Department with the position which the State Department itself announced in November, 1949, when difficulties were encountered with other nations in trying to draft a Convention on Freedom of Information. (See State Department Bulletin, November 14, 1949).

> Governments, or more accurately administrations of the moment, have from time immemorial claimed the power to judge matters of this nature for their citizens, and too often the test has been the interest of the administration rather than that of the people. Many of the allegations of misconduct or inadequate performance leveled by some governments at the free press cannot, therefore, be taken at face value.
>
> Yet, whatever be its true source, the threat to the traditional American concept of the free press cannot be ignored, especially at a time when the totalitarian thesis is exerting its maximum pull. The freedom of information debate in the United Nations has served to clarify the issues and to give a powerful thrust to the democratic thesis. But the pressure on the "middle states" is strong, and there is a growing tendency to distrust both extremes.
>
> In the present titanic struggle for the minds of entire peoples, this debate presents a great challenge to the information enterprises of the United States and to our government. The challenge demands renewed efforts to demonstrate the courage of our democratic convictions by convincing others through example and discussion that in the case of freedom of press as with other civil liberties the price of freedom is small indeed when compared with the terrible cost of the regimented society.

Regardless of the foregoing position taken by the State Department in 1949 in defense of freedom of speech and of press, our State Department is now again embarked on a policy of appeasement and by its proposed approval of the provisions in the Covenant abridging freedom of speech and freedom of press apparently intends, as it has done in other matters, to sacrifice the fundamental interests and rights of the American people in order to secure an international agreement. The State Department is apparently now prepared to follow as to the Covenant the same course of appeasement that it followed with respect to the provisions of the Declaration and of the Genocide Convention.

The traditional American theory of government was and is that our basic rights are "retained by the American people" even as against the government itself and are not subject to change or modification unless the Constitution be changed by the people themselves. Since the people expressly reserved these "retained rights" and did not grant their control to any agency of government, our governing officials have no constitutional power to take them away, or modify them, whether by treaties or otherwise. Nevertheless, our officials have already done this and are now, in connection with freedom of speech and of press, proposing to do the same thing.

Trend in U. N. Is Reversal of American Concept of Rights

When we adopt or acquiesce in the theory that the United Nations Assembly through its Declarations (plus, in some instances, ratification of a treaty by our Senate) can fix and define or qualify our basic individual rights, then it follows that the same authority that confers these rights may later withdraw them or limit them or condition them in such manner as a majority of the representatives of the other nations of the world may from time to time deem appropriate. This is a complete reversal of the American concept of basic rights and of government. Thus the whole international "Bill of Rights" program is predicated on the un-American theory that our basic domestic individual rights can be limited or abridged by international action and that likewise the social and economic well-being of our citizens may be defined and fixed and conferred by international declarations.

Certain it is that every dictator and dictatorship will and can readily approve the abridgment of free speech and of press as now set forth in the Covenant on Human Rights, the present draft of which has been approved by our State Department. If ratified, the standards set by such a treaty will become international law for the conduct of nations and domestic law for the citizens of each American state. The State Department's only defense, as I have stated, is that compromise is necessary to obtain an international agreement on freedom of speech and of press. Haven't we had enough compromise and appeasement at Yalta and elsewhere? Shall we now sacrifice fundamental principles of freedom of speech and of press for the sake of compromise? If our State Department so yields to compromise and thus sacrifices our fundamental rights of freedom of speech and of press, God help us when and if the present State Department negotiates a covenant with Russia and the other nations of the world on control of the atomic bomb.

Once you lower standards of individual freedom they become accepted standards everywhere. For which standard of free speech and free press are we fighting under the banner of the United Nations in Korea—the standard of the Covenant or the standard of the Constitution and the Bill of Rights of the United States? Certain it is that if we agree to these proposals regarding freedom of speech and of press, it is both a legal and a moral admission that the

(Continued on page 635)

Fundamentals of Oil and Gas Law:

An Outline for the General Practitioner

by **Clarence E. Hinkle** • of the New Mexico Bar (Roswell)

■ The field of oil and gas law is less than one hundred years old, but the value of the commodities with which this legal newcomer deals and the complex problems of ownership and exploitation involved have already produced a branch of the law that is in its way a specialty. In this article, Mr. Hinkle gives a résumé of the problems that must be solved by the lawyers who have occasion to work on this subject. The article, designed for the average member of the Bar who is not particularly engaged in the practice of oil and gas law, is taken from a paper presented at the annual meeting of the State Bar of New Mexico last October.

■ The law pertaining to oil and gas is a relatively new field of the law. Although oil and gas were known to exist even in Biblical times, they have only come into commercial use within the last one hundred years. The first petroleum oil and gas known to man was obtained from oil springs and seeps. The Old Testament mentions fountains of oil which undoubtedly related to petroleum springs or seeps. There is evidence that oil in ancient times was used to some extent for medicinal purposes and it is well known that the Egyptians used petroleum and asphalt in the preservation of mummies. Long before the first oil well was drilled in the United States, oil springs and seeps were known to exist in Pennsylvania, New York, California and other sections of the country.

The first oil company organized in the United States was the "Pennsylvania Rock Oil Company" which was organized for the purpose of exploiting the possibility of the use of oil from certain oil springs in Pennsylvania. The first well was drilled by the Pennsylvania Rock Oil Company near Titusville, Pennsylvania, in 1858. This well was drilled to a depth of 69½ feet after much difficulty and resulted in a well capable of producing about twenty-five barrels of oil per day. Shortly after, other wells were drilled in the area and one well was found that produced nearly 4000 barrels of oil per day. The market price of oil in September of 1859 went to $20.00 per barrel but by November, 1861, so much oil was being produced that, there being a very limited market for it, the price fell to five cents a barrel.[1]

Knowledge of Physical Characteristics Is Necessary for Understanding Law

In order to understand thoroughly the law of oil and gas and the reason for some of our court decisions, it is necessary to know some of the physical characteristics of petroleum. The origin of petroleum is still not positively known. There are quite a number of theories, but perhaps the most generally accepted theory of the origin of petroleum is that it is the result of the slow decomposition and distillation of plant and animal remains. One of the most significant factors in connection with oil and gas, as related to its legal status, is its "power of migration". Oil is a volatile liquid and when placed on the surface of the earth it has some of the characteristics of other liquids in that it seeks the lowest level through the force of gravitation; natural gas, being lighter than air, would, of course, effuse and escape upward. However, oil and gas in their natural state, when discovered hundreds or even thousands of feet under the ground, are not controlled by the same forces of nature as they are controlled on the surface of the earth. Some of the courts in the early decisions dealing with the law of oil and gas treated petroleum as being migratory in the sense that it should be likened to the flow of water in underground streams.

Oil and gas are usually found in a porous stratum of rock or sand overlaid with a caprock practically impervious to oil and gas. They are usually confined to these strata by physical barriers on all sides which prevent their migration. These reservoirs containing oil and gas are commonly referred to by geologists as domes, structures or stratographic traps. It is only when the impervious strata above the natural oil reservoir

1. Historical sketch, Thornton, *Oil and Gas*.

is penetrated that oil and gas take on the characteristic of being migratory. When a well penetrates the impervious caprock into the porous oil and gas stratum, the oil in the surrounding territory begins to move toward the opening and, oftentimes under great pressure due to the gas or water drive, results in the drainage of a considerable area around the well. The extent of drainage, of course, is governed largely by the physical aspects of the particular reservoir and the porosity and permeability of the stratum from which the oil or gas is being produced.

These physical characteristics are closely allied with the development of oil and gas law in that in the development of the law the courts have had to take these characteristics into consideration in distinguishing the multitude of cases relating to hard minerals and also relating to ground and surface waters which would at first seem to be analagous.

Various Theories Consider Ownership of Oil and Gas

There are a number of different theories of the ownership of oil and gas as related to the owner of the fee or the land from which the oil or gas is produced. Most of the courts now recognize that oil and gas are minerals and the Court of Appeals for the Tenth Circuit has held that a patent reserving all the "coal and other minerals" to the United States, includes oil and gas.[2] Likewise, most states now recognize oil and gas, before they are actually produced, to be an interest in real estate or a part of the fee.

Because of the physical characteristics of oil and gas which have been referred to, one land owner over a common source of supply or owning a portion of the lands over an oil and gas deposit or field cannot produce oil or gas therefrom without theoretically, and in most cases actually, causing some displacement of the oil or gas under his neighbor's land. This physical aspect as it came to be more and more recognized by courts led to a modification of the theory of the ownership of oil and gas in place, which is sometimes referred to as the theory of "qualified ownership of oil and gas in place". This qualified theory has also been referred to by some courts and by some authors as the "law of capture". The gist of these decisions is that the land owner or operator has no property in the oil and gas until he actually reduces them to possession. A land owner may have oil and gas under his land today which he considers his property, yet they may be produced from his neighbors' wells tomorrow.

For many years oil fields were developed by each land owner or lease owner drilling as many wells as he could on his land so as to be able to recover as much of the oil as possible from the common source. This was in line with the theory of the law of capture or reducing the oil and gas to physical ownership before the adjoining land owner did so. By this method the gas pressure of the reservoir was soon dissipated, and in most cases a large percentage of the oil was left in the ground with no natural means or pressure to force it into a well bore to be produced. It was not until about 1925 or 1930 that the oil industry began to take measures to remedy this situation through proper methods of drilling and spacing and the producing of wells by maintaining proper oil and gas ratios so as to promote the greatest ultimate recovery with a minimum of waste. Most of the oil-producing states, in recognition of these principles and also in the interest of the conservation of natural resources, have now enacted conservation measures requiring oil and gas to be produced with a minimum of waste. These statutes generally recognize the correlative rights of the owners of the property in a common reservoir.

Oil and Gas Leases Take Various Forms

Perhaps the instruments most frequently used in the oil industry which attorneys are called upon to prepare and to consider professionally are oil and gas leases, mineral and royalty deeds. The first oil and gas lease of which there is apparently any record was a lease of an oil spring in the Oil Creek region of Pennsylvania. This lease consisted of less than one hundred words and is as follows:[3]

> Agreed this fourth day of July, A. D. 1853, with J. D. Angier of Cherrytree Township in the County of Venango, Pa., that he shall repair up and keep in order the old oil spring on land in said Cherrytree Township, or dig and make new springs, and the expenses to be deducted out of the proceeds of the oil, and the balance, if any, to be equally divided, the one-half to J. D. Angier and the other half to Brewer, Watson & Co., for the full term of five years from this date. If profitable.
>
> Brewer, Watson & Co.
> J. D. Angier.

From this humble beginning the present commercial form of oil and gas lease has evolved. The most commonly used lease form in the industry is what is known as the "Producers 88". But do not assume for a moment that all Producers 88 forms are alike. I am informed that someone made a collection of over 175 forms of "Producers 88" leases, no two of which were exactly alike. While these lease forms are not duplicates, most differ only in language rather than legal effect. It would be an endless task to try to analyze each of these forms for its legal effect. However, I should like to discuss briefly some of the provisions that are common to most all Producers 88 or commercial oil and gas leases.

All the lease forms commonly referred to as "Producers 88" are what are commonly known as "unless leases". These are also sometimes referred to as "drill or pay leases".

The "unless" form of lease seems to have appeared about 1875 after the oil and gas industry became fairly well stabilized and the commercial form of lease began to take shape.

"Unless" lease forms are for a definite term of years, usually five or ten, and for "as long thereafter as oil or gas is produced" and sometimes the words are added "in paying" or "commercial" quantities. They also

2. *Skeen v. Lynch*, 48 F.(2d) 1044, 284 U.S. 633, 76 L. ed. 539.

3. 1 Thornton, *Oil and Gas* 58.

provide that if no well is commenced before a certain date, which is usually the anniversary date of the lease, that the lease "shall terminate" "unless the lessee on or before that date shall pay or tender to the lessor" in the depository bank named in the lease a certain "delay-drilling rental" usually equivalent to so much per acre. It is also provided that in like manner and upon like payments the commencement of a well may be deferred from year to year. The courts have rather uniformly held that these "unless" forms terminate *ipso facto* upon failure of the lessee either to drill or pay.

The termination of the lease under the "unless" clause has been spoken of by some courts as a forfeiture; however, most courts have referred to the "unless" clause as a limitation under which the lease ceases to exist upon failure of the lessee either to drill or pay. It has also been held that there is no obligation on the part of the lessee either to drill or pay and consequently no action can be brought for the recovery of the delay rental. The provisions with respect to the time provided for the commencement of drilling operations or within which to pay the delay-drilling rental have been strictly construed and unless these provisions are strictly complied with the lease will terminate. Most leases provide that payment of the delay rental may be made either to the lessor or by deposit to the lessor's credit in the depository bank named in the lease and in such cases it is held that the lessee may make payment either directly to the lessor or by credit to his account in the depository bank so long as the payment is made to the lessor or the deposit to his credit in the bank actually takes place on or before the time for payment specified in the lease.

Authorities Differ on What Constitutes "Commencement of a Well"

There is some conflict of authority as to what constitutes the commencement of a well within the meaning of the ordinary form of "unless lease". It is, of course, plain that if actual drilling was commenced prior to the date provided in the lease that this would satisfy all the requirements and the general rule seems to be that if the well has been located and some operations are commenced, such as moving the rig to the location or making preparations for drilling in good faith that these will constitute commencement of the well within the meaning of this clause of the lease.[4]

Most of the Producers 88 forms of leases contain substantially the following granting clause:

> . . . has granted, demised, leased, and let and by these presents does grant, demise, lease and let unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, and laying pipe lines, and building tanks, powers, stations and structures thereon to produce, save and take care of said products . . .

There are several modifications of this form of granting clause, some of which cover not only oil and gas but "all other minerals". In addition, some have been broadened to include exploration, unitization, repressuring or pressure maintenance and recycling operations. These are more or less recent developments and questions are now being raised as to whether or not the ordinary granting clause in a lease gives to the lessee the exclusive right to explore the land for oil and gas by modern geophysical methods such as the use of magnetometers, tortion balance, gravity meters and seismographs. A recent decision of the United States Court of Appeals for the Fifth Circuit held in effect that where the granting clause of the lease made no mention of the right of exploration that the lessee had the implied right to explore the land by seismographs.[5]

As I have previously stated, the ordinary form of oil and gas lease is for a definite term of years and "as long thereafter as oil or gas is produced". This is usually considered as part of the *habendum* clause of the lease and there are a number of different variations or modifications thereof. This clause is frequently referred to as the "thereafter" clause and the reason for the same is readily

Reddien

Clarence E. Hinkle, a member of the Roswell, New Mexico, Bar, was educated at New Mexico Military Institute and Washington and Lee University, from which he received his LL.B. in 1925. He is President of the Board of Regents of the Institute. In 1931-33, he was a member of the New Mexico House of Representatives, and of the New Mexico Senate, 1945-47.

apparent as the lessee or operator could not afford to develop the leased premises for oil and gas and invest large sums of money in doing so and be prevented by a short-term lease from producing all the recoverable oil and gas. Some of the "thereafter" clauses provide that the lease is to continue so long as oil and gas are produced in "paying quantities". Others provide that the lease is to continue as long as oil and gas are produced in "commercial quantities". Others provide that the lease is to continue so long as either oil or gas is produced from the leased premises. As to what constitutes "paying quantities" or "commercial quantities" in these cases, most of the courts seem to hold that it will be left largely to the discretion of the lessee under the reasonable assumption that the lessee would not continue to produce oil or gas if it were not profitable to do so.

Another situation that frequently arises in connection with the "there-

4. 1 *Summers, Oil and Gas,* § 349.
5. *Yates v. Gulf Oil Corporation,* 182 F.(2d) 286.

after" clause is where after the lease has been extended beyond the primary term by production, the production ceases during the thereafter period. These are usually cases where production actually ceases temporarily due to mechanical or physical difficulties while the lessee is engaged in reworking operations. Technically and literally, in those cases there is no actual production from the lease. The trend of decisions in that class of cases seems to be that so long as the lessee is engaged in bona fide reworking operation the lease will continue and if the reworking operations result in the re-establishment of production that the lease will continue so long as oil or gas is being produced, but this, of course, would not be true where there is an abandonment of the lease.

Some forms of Producers 88 leases contain a provision that if the lessee shall commence the drilling of a well prior to the expiration of the primary term of the lease that he shall have the right to drill the well to completion with reasonable diligence even though the drilling thereof may extend beyond the primary term and that if oil and gas, or either of them, are found in paying quantities, that the lease will continue in full force and effect as if such well had been completed within the primary term of the lease. This form is known as the "commence form" of Producers 88 lease and of course is preferred by most oil operators and has come into extensive use during the last few years. The reason for the clause is, of course, obvious, and is primarily for the benefit of the lessee in that the lessee can commence a well just prior to the expiration of the primary term and have the right to complete the same. In many respects it is a fair and equitable clause and justified in that oftentimes discoveries are made on adjoining leases or leases embracing lands in the vicinity of other leased lands just prior to the expiration of the term of the lease and this provision affords the lessee an opportunity in those cases to validate the lease by immediate drilling operations.

Most Courts Recognize Implied Covenants in Lease

In addition to the express covenants contained in the ordinary form of oil and gas lease, most courts have recognized the existence of implied covenants on the part of the lessee to protect the leased premises from drainage caused by offset wells and for reasonable development. These doctrines of implied covenants have become well embedded in our law and there are many decisions to be found covering them and many of these decisions turn upon the particular facts and circumstances of the case under consideration. Of course, where an oil and gas lease contains an express covenant for the protection of the leased premises from drainage by offset wells and for reasonable development, which is sometimes the case, there can be no implied covenant covering the same. One of the first and leading cases on the doctrine of implied covenants in oil and gas leases is the case of *Brewster* v. *Lanyon Zinc Company*, 140 Fed. 801, 72 CCA 213. One of the most recent decisions laying down the rule in the federal courts with respect to implied covenants for reasonable development is the case of *Sauder* v. *Mid-Continent Petroleum Corporation*, 292 U.S. 272; 78 L. ed. 1255 (1934).

The reason for the doctrine of implied covenants with respect to protection against drainage and for reasonable development is, of course, readily apparent. It would be inequitable and unjust so far as the interest of the lessor is concerned to have the lessee stand by and permit the leased premises to be drained by offset wells without the lessee taking some definite action to protect the leased premises, nor would it be equitable or just to permit the lessee to drill one or two wells and hold the lease indefinitely without reasonably developing the leased premises to an extent that an operator would normally or customarily develop them.

A majority of the courts seem to hold that the lessee is only required to comply with these covenants to the extent to which a reasonably prudent operator with full knowledge of all the facts and circumstances would have complied with the same under similar circumstances. There are a lot of physical facts which have a bearing on the enforcement of the implied covenants and, as previously stated, most of the cases turn upon the particular facts and circumstances at hand and usually a lessee will not be required to engage in some operation that will specifically result in a loss to him. In determining whether or not a lessee has been guilty of the violation of these covenants the court will take into consideration the depth and the cost of the wells which it is necessary to drill to comply with the same and also what may be the reasonably anticipated recovery, the character of the formation from which the oil or gas is being produced and in the case of offset wells as to whether the proximity of the offset well and the conditions are such that it is likely to cause drainage.

Public Land States Have Three Classes of Lands

In some of the states, especially in the public land states, it is necessary to deal with three classes of lands, *viz.*, fee or privately owned, state and federal lands. The laws governing the issuance of leases upon state lands, of course, vary in each state, but leases on all the public domain are governed by the Act of Congress approved February 25, 1920 (41 Stat. 437), being an act to promote the mining of coal, phosphate, oil, oil shale and solium on the public domain, which is generally referred to as the Federal Mineral Leasing Act, and which I should like to discuss briefly.

Under the provisions of the Federal Mineral Leasing Act as originally passed, an oil and gas prospecting permit was granted to the first qualified applicant for not to exceed 2560 acres. In order to be qualified for a permit, the person had to be a citizen of the United States and his holdings within any one state could not exceed three leases of more than 2560 acres each, not more than one of

(Continued on page 636)

Business and Law:

New Responsibilities for Free Enterprise

by **Carrol M. Shanks** • President, Prudential Insurance Company of America

▪ The central problem confronting business in our country today, in view of the duties and responsibilities imposed upon it by public opinion and by governmental action, Mr. Shanks believes, is the maintenance of those qualities of incentive, initiative, flexibility and ingenuity characteristic of our free enterprise system. Mr. Shanks says that the lawyer who has actively practiced his profession most fully meets the requirements for leadership in solving this problem. This article is taken from an address delivered before a conference of business and professional leaders in connection with the dedication of the Southwestern Legal Center, Dallas, Texas, April 19, 1951.

▪ Not many decades past, the form, the requirements and the responsibilities of business were relatively simple. Laws affecting business were few and compliance with them not difficult. They made little demand upon lawyers. However, the vast industrial development and expansion of our nation following the War Between the States and the emergence of the corporation as the normal vehicle for enterprise, enormously increased the complexities of business. They also brought government and business into constant and continuing conflict. Government asserted domination. Business had to cope with the Interstate Commerce Commission, the Sherman Act, Theodore Roosevelt's trust-busting, the Clayton Act, the Federal Trade Commission Act, the income tax laws. The holding company came along. Then followed the Wagner Act, the Securities and Exchange Commission, and the whole flood of government commissions, regulation, intervention and interference in business during the thirties, World War II and the Cold War period to date. The flood continues to rise. The prospect before us is further rapid change, probably increased intervention by government, and most certainly a growing need for the lawyer's contribution.

Free enterprise finds itself in this position. Unlike government and government-supported institutions, with which it is constantly being compared and often must compete, free enterprise must make both ends meet and remain solvent. It must maintain incentives by making a profit, must finance expansion, modernization and replacement out of earnings or through borrowing or sale of equities. It must show earnings possibilities and general health to command credit. At the same time most onerous duties are placed upon free enterprise by public opinion and by governmental requirements. With most of these I am in hearty accord. Nevertheless they are burdensome. Free enterprise is expected to maintain steady employment, to provide retirement allowances, to provide life, accident, health and hospital insurance in one form or another to employees and dependents, to compete in a free and open market without any action tending to restrict the freedom of that market, to hold down the price of its product, to act in furtherance of the community and area where it does business, to pay heavy taxes which often are used in part to subsidize competitors, to get along with labor unions regardless of what attitude the unions may take, to support private charities, and to observe a host of governmental regulations and requirements which often are actually contrary to the best interest of the corporation, even though presumably in the national interest.

Expanded Responsibilities Imposed on Business

The problem now confronting business is, I believe, very nearly the central problem before our nation today. In view of the enormous complexity of the requirements and responsibilities of business, and in view of the heavy duties and obligations imposed upon it by public opinion and by governmental action, can business maintain those qualities of incentive, initiative, flexibility and ingenuity which characterize it? These are among the principal virtues of our social system, which give it superiority over totalitarian forms —and those virtues are rooted in our

free enterprise system. I believe those qualities can be maintained, but it is not clear that they can be. If they are maintained, I believe the lawyer will have more than a fair share in maintaining them.

What does an analysis of the problems confronting business at the present time show? In the not distant past there is a background of simple obligations. About all that was expected of business was to mass produce in a competent fashion, to develop markets vigorously and to earn well enough to attract new capital for the betterment and replacement of tools and equipment. Today greatly expanded requirements are imposed by public opinion, government, stockholders and the thinking of management itself. These expanded requirements range widely into the social and economic setting of our nation. They have to do with responsibility to employees, to stockholders, to the communities where business is done, and in connection with over-all national problems, such as the all-determinative problem of the maintenance and increase of the real purchasing power of the people generally.

There are elements present throughout which must be mastered by management if business is to do what is necessary and expected. First, change is ever present and may well proceed at accelerated pace. Second, there is the necessity of adjustment to government particularly, and to labor and social problems generally. The mastery of these elements obviously calls for leadership which by training and temperament is sufficiently able and imaginative to envisage what must be done and to accomplish the changes called for. Further, the leadership must be that which understands the nature of our culture and comprehends the interrelationship and constant interplay between business, society, government and the economy. It must be aware of the onward flow of these forces. It must sense the trends of that flow and be able to make the requisite adjustments to them—in time.

Attributes of Lawyers Valuable in Business

In theory the lawyer meets the requirements of such leadership perhaps more fully than those not trained in the law. In my own experience as an executive rather than as a lawyer, I have noted a number of attributes of the lawyer which are of the highest value in business, and which seem to have their base mainly in law training and experience rather than in general or native ability.

First: Flexibility of viewpoint, willingness to adjust to present-day problems, and vision as to the place and responsibility of business in society. These are rooted to a remarkable degree in law training. The lawyer has grown up in the law on the concept of our common-law heritage as a growing, living and changing thing, a body of law which forms and ceaselessly reforms to meet present-day needs. This basic viewpoint becomes a part of the lawyer and lives with him both consciously and in the subsconscious. Precedents he uses as a guide and for stability, but well knowing that they cannot be slavishly followed to thwart present needs. The layman is much more given to continuance of what has been than is the lawyer with his strongly held concept of natural adjustment to change.

The lawyer by training and experience is habituated to the handling of one problem after another. He concentrates on the one in hand, solves it and disposes of it. The next problem coming to him may be, and often is, different and novel. He thinks nothing of it because that is his professional job. On the other hand, the normal layman in business, except well up the line, is more used to jobs of a continuing type and sameness. He is accustomed to handling things of a familiar cast and tends to shy away somewhat from the novel and unfamiliar problem. The lawyer's tendency to welcome and take on the new problem tends to that flexibility of viewpoint and willingness to adjust to present-day problems which business calls for today.

Second: Consciousness of the vital necessity of obtaining the facts, objectively, on which a course of action may be predicated. Both the training of the lawyer and his hard experience have taught him that he must go to all ends to obtain all pertinent facts, and that he must view them objectively without letting in wishful thinking. I am convinced that in business decisions, even by so-called hard-headed big business executives, there is often a lack of objective thinking, while at the same time wishful thinking, bias, predilection and ideological viewpoints distort the picture. The lawyer, I believe, by reason of his training and experience, more often avoids such unsound procedure. He has had thoroughly instilled in him a zeal objectively to dig out the facts and make sure he has all that can be had before acting. This will lead him into all related matters, sciences, and studies. He is aware that otherwise the true significance of available items of information may not come to light. Unhappily, many business decisions must be made with an insufficiency of facts—but the lawyer will tend to get more.

Third: A lawyer is trained to think about and envisage all steps, no matter how varied and seemingly unrelated, necessary to put some particular proposal into operation. These things he must think out in the utmost detail. Hard experience in practice, if not law training, has taught him that mechanics and timing, no matter how minor, are fraught with tremendous stoppage powers and can hamper or halt a program and make it completely impractical. This is true even though the over-all concept seems sound and a good idea. The attribute of thinking through and summoning up the requisite steps is vastly important in business. The lawyer tends to have it more than others and it sets him apart as an important and indispensable man. Others, of course, have the attribute in varying degrees, but the lawyer more often has been in-

tensively trained to think through in detail.

Fourth: Closely tied in with the lawyer's flexibility of viewpoint and his embracing of the new and novel problem are his willingness and ability to assume responsibility. This means the willingness to give a final answer to some question or an opinion in regard of it whereupon action can then proceed. He accepts responsibility as a matter of course because of habits developed in practice. At all times in practice, the lawyer is called upon to advise clients on matters involving all types of problems, with sometimes not too much law involved. Clients accept his views with apparent relief in most cases, regardless of the fact that often the subject matter lies within the purview of their experience rather than his. By experience and by training the lawyer is unusually well equipped to assume final responsibility for saying "yes" or "no" or "go ahead".

Fifth: The lawyer is trained in the possibilities of law as a positive instrument in connection with social and economic values. He is grounded in the great influence law has exerted, over the centuries, in forming the institutions of today; and he has been trained in the possibilities of its use to shape the institutions of the future. Such grounding and such training prepare the student of law to contribute to the evolvement of the institutions of the future through the actual working of the business life of the nation, through the impact of law upon business life, and through the reaction of business life to the impact of law.

The foregoing are attributes of the lawyer which to my mind have their base mainly in law training and experience, rather than in other sources, and which are of great value in business. Moreover, the lawyer having to do with business is generally, or at least often, in a position to bring his attributes, personality and influence to bear in shaping the course of business. Lawyers in business fall either into the category of legal advisers or the category of those who have shifted over to executive positions. Among those classed as legal advisers I include those who in actual fact remain in practice but who advise their business clients on countless matters. Legal advisers, whether in practice or within the business, exert great influence upon broad company policies, even though they may be primarily concerned with legal matters. They are thrown with and advise the policymakers of business and are in the most favorable spot to direct its course.

The lawyer who has turned executive is often in a policy-making spot. I need not point out the great number of important business institutions headed by lawyers. They are in policy-making spots not only because of their attributes but also because they, as legal advisers, were thrown with and advised the policymakers and in due course succeeded to the policy-making job.

At this point, I must point out that the qualities and attributes which make the lawyer of special value to business are developed in the main not in his formal legal training. On the contrary, they grow principally from active experience in the practice of law. I believe that no young lawyer, although of course there will always be exceptions, should go directly from law school to business. This is true even though his aim from the first may be a business career. Further, his practice should, if possible, be in association with other lawyers. Only then, I believe, will his lawyer-like qualities grow to a point where he will make his greatest contribution to business. Native abilities and qualities will be hard pressed to compensate for lack of a substantial training in actual practice. I need not discuss this in much detail except to say that the young lawyer going directly to business probably will meet the same conditions confronting the layman, namely, a sameness of problems, the handling of things with a familiar cast. The practicing lawyer faces and deals with the new, novel and different. He makes decisions and takes responsibility. Those are what the policy-making executive in business does.

Underwood & Underwood

Carrol M. Shanks, a native of Fairmont, Minnesota, was graduated from the University of Washington in 1921, and from the Law School of Columbia University in 1925. After practicing in New York City, during which time he lectured at Columbia Law School, he became an Associate Professor at the Yale Law School. He joined The Prudential Insurance Company of America in 1932 and became its president in 1946. He is a member of the Council of the Survey of the Legal Profession. His favorite recreation is big game hunting.

It follows from what I have said that I believe the lawyer by training and experience is often in a better position than the layman to supply the leadership which business requires to surmount the problems facing it today. Can business maintain those qualities of incentive, initiative, flexibility and ingenuity which characterize it? Can business management master the element of change, accelerated change? Can management make the necessary adjustments to government, labor, and social and economic problems generally?

If business is to retain those qualities which in general it now possesses; if business is to master the problems of change and make the necessary adjustments to other factors in society; then, in my view, it must remain essentially free. It must be free to

act and to maneuver, free to move promptly, with management in a position not only to make decisions but to put them into effect. This is not to say that business need be unrestrained by proper regulations or laws in the public interest. It is to say, however, that such regulations and laws must stop short of the point where management cannot decide what course to pursue or where its decisions cannot be made effective, because the means to that end are controlled by government and cannot be availed of by private enterprise without crippling accommodations to governmental demands.

To retain this freedom, I have no doubt that business must assume responsibilities beyond those which fall within the thinking of many business executives, yet are fully encompassed by the view of a large and growing segment of management. Executives within this latter group are far from rejecting heavy social and economic responsibilities. They believe strongly that business and its executive should accept such responsibilities as a contribution which business uniquely is in a position to make toward the preserving and strengthening of our free enterprise representative democracy. One can list at great length what these responsibilities are and, one way or another, many of them have been referred to in this paper. An example is the responsibility of business to reduce, so far as possible, unemployment among its employees. During the last two generations we have become largely a nation of employees. Most people today, certainly in the cities, have almost nothing but a job. Nothing could have a greater stabilizing effect upon the staff and the community, to say nothing of business generally and the nation, than an uninterrupted year-round pay check. Business should provide for its human material reaching retirement age through reasonable pension provision. Likewise, life, accident, health and hospital insurance, in one form or another, is a commonly accepted responsibility.

Business must have regard for the effect of its seemingly purely business decisions upon the public generally. Sound policy calls for making such decisions in the long-run public interest. The location of a plant, credit policy, pricing policy are examples of decisions that may deeply affect the public welfare. The public may well demand that such decisions be, first, in the long run, best welfare of the community, and, second, that they keep the business healthy and profitable. Businessmen should assume leadership in the affairs of the community where they work. Likewise, business influence upon overall national problems demands the acceptance of commensurate responsibility. At the present time, business responsibility and duty to do all possible toward restraining inflation is a heavy and active duty.

Business Must Maintain and Increase Consumer Purchasing Power

All such duties and responsibilities on the part of business are important. Yet, to my mind, there are two things which in the long run will determine largely the extent to which business remains free. The first is the way business performs its duty toward maintaining and increasing the over-all purchasing power of the people generally. Adam Smith in his *Wealth of Nations* said some 175 years ago that:

> Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer.

His statement is even more true today, if possible, than when made.

Adam Smith went on to say:

> The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it. But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption, as the ultimate end and object of all industry and commerce.

Adam Smith's comments are most illuminating to one considering the state of business today. We see the almost universal tendency, to be sure under the powerful prodding of labor, to push up wages and salaries and thus distribute production gains almost entirely to the employees of that particular business and to the stockholders. The result to the consumer and to the economy is higher prices and reduced consumer real income generally, rather than lower prices and greater general purchasing power. Whether we look at this question from the point of view of the welfare of the producer, as most do, or the welfare of the consumer, the fact remains that the lowering of prices and the creating of greater general purchasing power is the greatest single contribution which anyone can make to the welfare of the country as a whole. I have seen it solemnly argued in many quarters that the better way is to give the production gains to the particular employees involved. The pragmatic test of experience, however, has shown that this almost inevitably means higher prices, lessened value of the dollar, lower consumer real income, and further erosion of all those whose incomes do not rise as rapidly. In the end, there is inability to consume the products of industry, thus closing the circle and causing lowering of production. Again, it is clear that unless our distribution system to the ultimate consumer is kept fully adequate to carry off all products as rapidly as produced, production itself cannot be maintained at a high level with consequent high employment. But the distribution system itself, no matter how effective in creating wants, can go only so far without the sustaining power of high consumer real income to turn the wants into effective demand. For the long run at least, business will gain most from an economy of high level activity and ever lowering prices through production gains. To this each company must seriously endeavor to make its contribution by holding down or lowering prices and constantly working toward more efficient production. The present-day situation eloquently speaks for itself, but even in depression periods the lowering of prices through the application of production gains tends, at the very least, to

(Continued on page 636)

Who Wrote "The Diary of a Public Man"?

A Seventy-Two-Year-Old Mystery

by **Benjamin M. Price** • of the Illinois Bar (Chicago)

■ The winter that preceded the Civil War was a critical period of planning and plotting in Washington. In 1879, a score of years later, the *North American Review* published serially what purported to be the "Diary of a Public Man" written in those days of crisis. The work was anonymous and probably was not a diary at all and its author is unknown to this day despite considerable literary detective work by scholars. Mr. Price retells the story of the Diary and weighs the intrinsic evidence bearing on the question of the identity of the author. He casts his own vote for Henry Adams, the distinguished American historian, who lived in Washington during the period covered by the Diary.

■ Seventy-two years ago there appeared serially in the *North American Review* one of the most interesting and mysterious historical diaries ever written. To this day it is not known who wrote it or even whether it was an actual contemporaneous diary. Nevertheless it has been frequently cited and quoted by historians and Lincoln biographers. Why did the author persistently cling to anonymity? In what attic lies the clue that will solve the mystery?

As originally published in the *Review*, commencing in August, 1879, it bore the subtitle, "Unpublished Passages of the Secret History of the American Civil War". Only recently was it published as a book (Abraham Lincoln Book Shop, Chicago, 1945). It covers the critical period from the end of December, 1860, to March 15, 1861, less than three months. The scene is Washington, with a one-day interlude in New York when Lincoln was in that city en route to Washington. About two-thirds of the Diary covers the brief period from February 24, after Lincoln had reached the capital, to March 15. The narrative covering these three weeks is particularly vivid and is the part of the Diary that writers for the most part have quoted or drawn from. The anecdotes concerning Lincoln and indeed the entire Diary reflect an experienced and critical writer,—no mere chronicler.

The Diary was published by the new editor of the *Review*, Allen Thorndyke Rice, who in a headnote vouched for its authenticity and explained that only excerpts were "put at his service". He died ten years later but took such pains to conceal the identity of the author that no one has been able to discover it. Most scholars, whatever they may think of the genuineness of the Diary, would agree that it is not a distortion of history and also that it is a fascinating account of the planning and plotting that went on in Washington during the Secession winter.

Although some doubt had been expressed it was not until 1948 that its authenticity as an actual diary was seriously questioned. Dr. Frank Maloy Anderson, after many years of study and investigation, was the challenger and most readers of his *Mystery of the Diary of a Public Man* (University of Minnesota Press[1]) will agree that he succeeded in proving that it is not an authentic diary written at the time of the events described in it.

Author's Name May Never Be Learned

Assuming that there was no actual diary, no real "Public Man", the question remains, who was the elusive author? Even if it is not a genuine diary, it is a work that anyone

1. The book includes the Diary in full.

would be proud to claim. The author must have had a special reason for preserving his anonymity and he succeeded to such an extent that his identity may never be established.

Dr. Anderson believes that Sam Ward, the "King of the Lobby", wrote the Diary, but most persons who have studied this question of authorship will agree that he does not prove his case. Of the many reasons for rejecting Ward, two are the obvious difference in tone and style and the critical accounts of Sumner. Ward was devoted to Sumner and one of his strongest traits was loyalty to his friends. Nor is it at all likely that the diarist was Amos Kendall, member of Andrew Jackson's Kitchen Cabinet, whom Dr. Anderson, in his article on Kendall in the *Dictionary of American Biography*, had previously picked as the probable author. The style does not faintly resemble that of Kendall's letters and other writings.

Long before the publication of Dr. Anderson's book, Sumner's biographer, E. L. Pierce, at a meeting of the Massachusetts Historical Society, identified the diarist, not by name but by description, as William H. Hurlbert, an editor of the *New York World* who later exiled himself in Italy because of a perjury charge, but we do not know Pierce's reasons for his choice.

Bernard De Voto picked Rice as the probable author.[2]

Finally Evelyn Page, of the English Department of Smith College, wrote an article in the *New England Quarterly* of June, 1949, claiming that the diarist was none other than Henry Adams. Like Pierce, De Voto and Anderson, she believes that the Diary is not an authentic or actual diary.

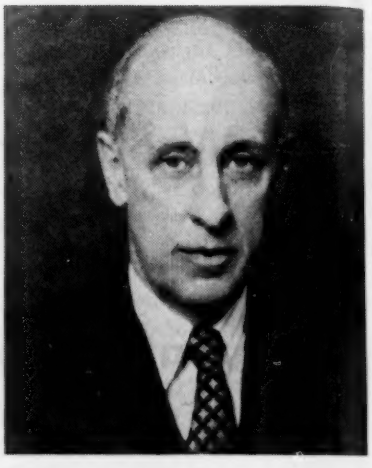
Henry Adams Is Likely Candidate

Assuming then that the Diary was not a genuine contemporaneous diary, let us consider whether it was probably written by Adams, Rice or Hurlbert. When I read the Diary in Dr. Anderson's book its style led me to suspect Adams, although he is not one of the many suspects considered by Dr. Anderson. I turned to the *Education* and found a resemblance in style and political slant. My suspicion became more than that when I read Miss Page's article. In a letter published in the *New England Quarterly* of September, 1950, Dr. F. Lauriston Bullard, the well-known authority on Lincoln, who has been much interested in the Diary and wrote a fine introduction for the Abraham Lincoln Book Shop edition, expressed the hope that someone would come forward and challenge Miss Page. To the present time it would appear that no writer has either supported or challenged her views.

Miss Page believes that the tone, style and political viewpoint of the Diary resemble that of Adams' *Education*, his letters of the period, his anonymous novel, *Democracy*, published almost at the same time as the Diary, and some of his other writings. The period covered by the Diary corresponds exactly with the period of Adams' first residence in Washington (December, 1860, to March, 1861). He had a habit of writing and reporting anonymously and in some instances took great pains to prevent disclosure of his identity. This very short account merely indicates some of her reasons,—one should get them first-hand from her interesting essay.

There are additional reasons, however, for believing that Adams wrote the Diary. Does not the position of Rice in connection with its publication have an important bearing on the question of its authorship?

Rice acquired the *North American Review* in 1877 at the early age of twenty-six and became its very able and enterprising editor. He changed its character, giving it a broader appeal, and made it a monthly instead of a quarterly. He ran a number of articles on the Civil War and the Diary was evidently one of the series. Rice accepted the Diary for publication in the periodical which he had recently taken over and of which Adams had just been the editor. Knowing that the Diary was not authentic as a diary (Adams would not have tried to deceive him) but realizing that it was an interesting and vivid account of the pre-Sumter days in Washington, Rice not only published it but took the risk of vouching for its authenticity in his editorial headnote. This he would have been willing to do if Adams were the author, but it is doubtful whether he would have thus accepted it from any other person,—certainly not from Hurlbert.



Benjamin M. Price has been practicing law in Chicago since 1923. Born in Pittsburgh, Pennsylvania, he received his B.A. from Princeton in 1904 and his B.C.L. from Oxford in 1907. He was admitted to practice in Pennsylvania in 1909. During World War I he served in the Infantry.

Adams Had Reasons for Remaining Anonymous

The reasons for this conclusion are obvious. Rice's own reputation and that of his magazine would have been seriously damaged if it later became known that the Diary was not genuine. If Adams were the author, Adams himself would have been insistent upon preservation of anonymity, if for no other reason, because of what he said in the Diary about Simon Cameron and a natural desire not to offend Cameron's daughter-in-law, Mrs. Don Cameron, whose

2. *Harper's Magazine*, May, 1945.

friendship Adams cherished. Adams would have insisted on anonymity and Rice would have trusted him. On the other hand Rice probably knew Hurlbert well enough to know that he was not trustworthy and, furthermore, Hurlbert had no particular reason for preserving his anonymity. It can be assumed that Rice would not have published this anonymous Diary had it been the work of Hurlbert or Ward or anyone else who might later divulge that it was not a real diary. And if the author not merely offered his work for publication but was solicited by Rice, then Adams was much more likely than anyone else to be asked by Rice to write about the pre-Sumter period.

Adams was ex-editor of the *North American*, a student of history, had taught history at Harvard and had just published the *Works of Albert Gallatin* and a fine biography of Gallatin. He had lived in Washington with his father, Charles Francis Adams, a leader in the House of Representatives, during the period in question and knew many of the actors on the scene. He had written current reports, unsigned, as correspondent for a Boston newspaper during the period. Hurlbert had none of the indicated qualifications. He was a well-educated man and a clever writer (perhaps *too* clever) but did not have the background or opportunities for observing and knowing what was going on behind the scenes in Washington. It is not likely that Rice would have asked Hurlbert, or anyone else except Adams, to write about that particular subject for the magazine whose new reputation Rice was working so hard to establish. Most of the actors had died but Adams had lived through and even reported the events and Rice undoubtedly knew his qualifications.

Another indication that Adams is the anonymous author is his avoidance of describing the important part which his father played in the drama, since such a description might have aroused suspicion that Adams wrote the Diary. Also, as Miss Page queries, why did Adams' intimate friend, John Hay, exclude any mention of the Diary from his and Nicolay's monumental Lincoln unless it was because he knew its origin and that it was not what it purported to be?

Of course there are also reasons[3] for believing that Adams was not the author, though something may be said in reply to those reasons.

Diary in No Sense Is Distortion of History

It can be said that Adams was a teacher of history and a noted writer of historical works and for that reason would not have "perpetrated" the Diary, which was not an actual diary as it purported to be. However, the Diary was published before he wrote his great *History* and up to that time he frequently wrote anonymously. More important, the Diary, although not an actual diary, is in no sense a distortion of history but gives the reader a true impression of the Secession winter in Washington.

It might also be contended that when the Diary was cited as authority by Rhodes and other historians and biographers, Adams, had he been the author, would not have remained silent but as an honest historian would have revealed that it was not authentic. However, some would say that if Adams were the author he would have chuckled over this development, especially as he could feel that he was not guilty of any distortion of the historical picture of the period. He would still not have desired to offend the Cameron family, not only Mrs. Don Cameron but also, later, her daughter Martha whom he loved dearly from the time of her childhood to the time of her death, which occurred about the same time as his own. What is more, it would have been entirely out of character for Adams to have admitted authorship of anything he had published anonymously.

Finally, consider the claims that might be advanced for the runners-up, Hurlbert and Rice.

The style of the Diary is not that of Hurlbert or Rice, nor did either of them have an impelling reason for writing anonymously.

No real argument can be made for Hurlbert. True, he was an editorial writer on the *New York Times* just prior to the Secession winter and in 1879 was editor-in-chief of the *New York World* with ready access to its files. He had ability of a sort. F. Marion Crawford called him a learned humbug, "hard to catch". These qualifications, however, are more than balanced by two solid reasons against his authorship: Rice, as we have seen, would not have accepted the Diary from him for publication, and, had Hurlbert been the author, he would have claimed the credit later in his life when he was under a cloud and the Diary had been acclaimed by historians.

The theory that Rice was the author fits in with the well-kept secret. He would have been the only person concerned and would have taken the secret to his grave ten years after the publication. But would he have risked his own reputation and that of his magazine? Keeping in mind his editorial headnote for the Diary, if it had become known that he was the author, he would have been branded as a fraud. Also, he was only a few years old in 1860-1 and received nearly all his education abroad, so he did not have the background of Adams or even of Hurlbert. He was a very busy editor in 1879 and even though he was a hard worker he would not have had the time, starting from scratch, to do the necessary research for the Diary, to say nothing of the actual writing.

It would seem at present that Adams is the most likely candidate for the honor. The style and tone are his and that is probably the best single test, but there is no absolute proof and unless proof turns up in someone's attic the mystery may never be definitely solved. A pity, because with Henry Adams as its recognized author the Diary would acquire, more than seventy years after its publication, a new interest and a wider appreciation of its worth.

3. The reasons given here are, in substance, those mentioned to me by Dr. Bullard, with whom I have had an interesting correspondence on this subject.

Proposed Amendments to the Constitution and By-Laws of the American Bar Association

To Be Presented to and Acted Upon at Its Seventy-Fourth Annual Meeting at New York City, September 17-21, 1951

■ To the Members of the American Bar Association and of the House of Delegates:

I

Notice is hereby given that Stuart B. Campbell, of Wytheville, Virginia, Osmer C. Fitts, of Brattleboro, Vermont, David F. Maxwell, of Philadelphia, Pennsylvania, W. E. Stanley, of Wichita, Kansas, and R. V. Welts, of Mt. Vernon, Washington, members of the Association and members of the Committee on Rules and Calendar of the House of Delegates, have filed with the Secretary of the Association the following amendments to the By-Laws of the Association:

(1) Amend Article I, Section 4 of the By-Laws by adding at the end of Section 4 the following:

Any firm of lawyers, a majority of whose partners are members of the Association, may become a patron member of the Association upon payment of the sum of $250 annually and the name of such firm shall be published in a firm patron membership roll. Patron membership as such shall not entitle any of the individual members of the said firm to any of the rights or privileges of the Association.

(2) Amend Article II, Section 2 of the By-Laws, by substituting for the present Section 2 the following:

Section 2. Pro Rata Payment. A newly elected member shall pay in advance his Association dues prorated for the balance of such year in which he is elected, computed on a semi-annual basis beginning with the half of the year in which he is elected.

II

Notice is hereby given that James R. Morford, of Wilmington, Delaware, a member of the Association, has filed with the Secretary of the Association the following amendment to the By-Laws of the Association:

Amend Article II by rescinding Section 2 thereof (relating to the quarterly pro-ration of dues of newly elected members of the Association) and renumber Sections 3 to 7 inclusive of Article II to bear numbers 2 to 6 inclusive, respectively.

III

Notice is hereby given that W. J. Jameson, of Billings, Montana, Howard L. Barkdull, of Cleveland, Ohio, Frank E. Holman, of Seattle, Washington, Franklin E. Parker, Jr., of New York, New York, and James L. Shepherd, Jr., of Houston, Texas, members of the Association and members of the Committee on Scope and Correlation of Work; and Stuart B. Campbell, of Wytheville, Virginia, Osmer C. Fitts, of Brattleboro, Vermont, David F. Maxwell, of Philadelphia, Pennsylvania, W. E. Stanley, of Wichita, Kansas and R. V. Welts of Mt. Vernon, Washington, members of the Association and members of the Committee on Rules and Calendar of the House of Delegates; have filed with the Secretary of the Association the following amendments to the By-Laws of the Association:

(1) Amend Article X, Section 6 of the By-Laws by inserting the following:

(a) A new line after line 9, Communications, to read:

Coordination of Bar Activities

(b) A new line after line 12, Federal Judiciary, to read:

Judicial Selection, Tenure and Compensation

(c) A new line after line 13, Law Lists, to read:

Lawyers Referral Service

(2) Amend Article X, Section 7 of the By-Laws by adding a new subsection to follow subsection (g) as follows:

Committee on Coordination of Bar Activities. This committee shall formulate and recommend plans for the integration and coordination of activities of the American Bar Association with those of state and local associations. The committee shall have the responsibility of giving effect to such plans as are approved by the House of Delegates, or, when occasion may require, by the Board of Governors.

(3) Amend Article X, Section 7 of the By-Laws by adding a new subsection to follow subsection (j) as follows:

Committee on Judicial Selection, Tenure and Compensation. The Committee shall study and collect data on judicial selection, tenure and compen-

sation, and report from time to time to the Association and to state bar associations with respect thereto.

(4) Amend Article X, Section 7 of the By-Laws by adding a new subsection to follow subsection (j) as follows:

Committee on Lawyers Referral Service. This committee shall study and report on methods of making legal service more readily available to persons of moderate means, and shall encourage and assist local bar associations and other agencies to accomplish this purpose.

(5) Reletter all subsections of Article X, Section 7 to run consecutively.

(6) Amend Article IX, Section 1 of the Constitution, by adding the following, after the word "nominations", in lines 16 and 17:

In the event the meeting of State Delegates for nomination of the officers of the Association or Members of the Board of Governors is held in conjunction with a meeting of the House of Delegates, if a State Delegate from the Continental United States shall fail to register in attendance at such meeting of the House of Delegates by 5:00 o'clock P.M. on the opening day thereof, the member of the House of Delegates from that state then present, with the greatest length of continuous service (or, if there be two or more present with equal length of service, but greater than that of any of the others from the state then present, one of them selected by lot by the Chairman of the House of Delegates), shall act as State Delegate from that state at such meeting of State Delegates.

IV

Notice is hereby given that Henry S. Drinker, of Philadelphia, Pennsylvania, Wilber M. Brucker, of Detroit, Michigan, John G. Jackson, of New York, New York, William B. Jones, of Washington, D. C., Frederic M. Miller, of Des Moines, Iowa, Shackelford Miller, Jr., of Louisville, Kentucky and William H. White, Jr., of Charlottesville, Virginia, members of the Association and members of the Committee on Professional Ethics and Grievances, have filed with the Secretary of the Association the following amendment to the Constitution of the Association:

Amend Article II, Section 3 of the Constitution by inserting before the word "disbarment" in line 8, the words "suspension or" so that the sentence contained in lines 6 to 9 will read as follows:

Any member shall be automatically dropped from membership upon the filing by any person with the Secretary of a certified copy of the final order for the *suspension or* disbarment of such member by any tribunal of competent jurisdiction.

V

Notice is hereby given that LeDoux R. Provosty, of Alexandria, Louisiana, E. Dixie Beggs, of Pensacola, Florida, J. Lance Lazonby, of Gainesville, Florida, J. H. Doughty, of Knoxville, Tennessee, Clarence Kolwyck, of Chattanooga, Tennessee, Blakey Helm of Louisville, Kentucky, Walter Chandler, of Memphis, Tennessee, Marcus C. Redwine, of Winchester, Kentucky, Cuthbert S. Baldwin, of New Orleans, Louisiana, and Scott M. Loftin, of Jacksonville, Florida, members of the American Bar Association, have filed with the Secretary of the Association the following amendment to the Constitution of the Association:

Amend Article VI, Section 6 of the Constitution, by deleting from line 5 the words "according to last preceding federal census" and substituting therefor the following:

as shown by any or either of (a) the last preceding federal census, (b) the certificate of the Clerk of the highest Court in the State, (c) the certificate of the President and Secretary of the State Bar Association, whichever shows the greater number of lawyers in that State,

so that the sentence contained in lines 3 to 8 of Section 6 will read as follows:

State Bar Associations in States which have in excess of two thousand lawyers as shown by any or either of (a) the last preceding federal census, (b) the certificate of the Clerk of the highest Court in the State, (c) the certificate of the President and Secretary of the State Bar Association, whichever shows the greater number of lawyers in that State, shall be entitled to one additional delegate for each additional one thousand lawyers above such two thousand; provided, however, that no State Bar Association shall have more than four delegates.

JOSEPH D. STECHER
Secretary

Co-operatives and the Income Tax: A Problem of Achieving Equality

by Israel Packel • of the Pennsylvania Bar (Philadelphia)

■ Mr. Packel says that our income tax laws levy taxes not on the cost of doing business, but on the cost of doing business profitably. This raises a peculiar problem when the business enterprise upon which the tax is imposed is a co-operative, since the co-operative is often said to be a nonprofit organization. If the tax is levied only upon profits, the co-operative escapes the tax. The form of the enterprise should not result in different tax results, he argues. On the other hand, as the Government's need for money for defense increases, the exemptions which now are granted co-operatives are being re-examined and narrowed by the Congress. There is a danger, however, he says, that the effort to obtain equity might lead to an attempt to hit co-operative transactions with patrons of the enterprise—transactions that result in no profit to the co-operative, thus falling outside the traditional concept of income.

■ The increased cost of government resulting from the clouds of all-out war is borne by individuals or by their economic enterprises. An increase in the rate of the income tax is one way of meeting the rising cost of the Federal Government. The elimination of exemptions is another way of coping with the problem and, therefore, Congress is appropriately re-examining the Topsy-like growth of exemption provisions relating to various types of co-operatives. A decade ago the writer urged such a legislative study.[1]

The same demand for equality which calls for the elimination of unjustifiable exemptions dictates that a tax which is imposed on profits should not tax co-operatives or any other organizations for that matter, on that which does not constitute profits. Thus, wholly aside from any question of the elimination of exemptions, it is important to determine the extent to which equality calls for the application of income taxes to the economic activities of co-operatives.

The syllogism—income tax is a cost of doing business, co-operatives are engaged in business and therefore co-operatives must pay income taxes—starts with a false premise. The income tax is not a cost of doing business; it is a cost of doing business *profitably*. The company which does one hundred million dollars' worth of business pays no income tax if it has no profits. It may well be that under a sound system of taxation, the cost of government should be borne by economic enterprises on some basis in addition to that of profit. Until such a change is made in our tax system, however, it is not fair to single out co-operatives, assuming it could be done constitutionally, to make them pay an income tax on anything other than profits within the normal meaning of that word.

The *in terrorem* argument has been made some eighteen years ago in England[2] and here in the past few months, that discrimination in favor of co-operatives "is bound to tend to drive the taxed organizations out of existence, leaving the State with no support from the organizations which are conducting much of the business activities in the State".[3] This ignores the fact that if our economy ever approaches such a situation, there can always be a change in the system of taxation.

It does not truly help the analysis to pick on decisions[4] or authorities[5] referring to co-operative activity as nonprofit or to multiply decisions calling co-operatives merely agents or instrumentalities for their members.[6] There is no gainsaying that the word "nonprofit" must be examined in the light of the purpose for which the word is used.[7] Likewise equality of taxation is not to be escaped by getting courts to disregard corporate entities, which people set up for their economic advantage.

Co-operative Profits Are Limited in Nature

The real crux of the matter lies in the dual relationship of (1) co-operative and member and (2) co-operative and patron. They are not to be confused with each other, even though co-operatives generally deal with their own members. The co-operative and member relationship is comparable to that of the ordinary relationship between corporation and shareholder or between unincorporated association and owner

1. Packel, "Cooperatives and the Income Tax", 90 *U. of Pa. L. Rev.* 137, 155 (1949).
2. 175 L. T. 427 (1933); c. *Crichton*, "Cooperative Societies and Income Tax", 38 *Law Q. Rev.* 48 (1922).
3. Magill & Merril, "The Taxable Income of Co-operatives", 49 *Mich. L. Rev.* 167, 183 (1950).
4. *E.g.*, the holding that the co-operative came within the definition of nonprofit operation under an exemption provision of the Interstate Commerce Commission Act, *United States v. Pacific Coast Wholesalers' Assn.*, 338 U.S. 689 (1950).
5. "The profit incentive is the mainspring of commerce, but is the antithesis of cooperation". Henderson, "Cooperative Marketing Associations" 23 *Col. L. Rev.* 91 (1923).
6. *Infra*, note 9.
7. For a variety of situations in which the courts have considered the nonprofit or profit character of co-operative enterprises, see Packel, *Law of Co-operatives* (2d ed. 1947) 28.

except for (1) the democracy in control, whereby each member of a co-operative generally has one vote no matter what his capital interest may be and (2) the limitation on capital return, whereby each member of a co-operative gets at most a fixed maximum return which excludes what the economist calls entrepreneur profit. This limited return must be earned before it can be paid to members. Therefore, to the extent that the co-operative has receipts which it can use to pay such limited returns, it has profits within the meaning of the income tax law.

The limited return on capital of members refers to distribution to members. It in no way refers to increases in the growth of co-operative capital. The history of almost all successful co-operatives shows great increases in capital. Such growth, however, is by no means to be ascribed necessarily to income. Additional investments of capital or even contributed capital, whether it be a co-operative or any other association, is not profit subject to income tax. Sometimes increases of capital are evidenced by the issue of share certificates or participation interests in capital, surplus or reserves and sometimes the increases are purely by way of contribution. Yet, in any event, the rule is clear that such capital increases do not constitute income.[8]

This analysis of the co-operative and member relationship shows then that co-operatives do have taxable profits to the extent that their receipts can be used to pay a return on capital to the members. Conversely, capital received from members for which interests in capital or reserves are issued or for that matter capital contributed to the co-operative, does not constitute taxable income.

Co-operative-Patron Relationship Is Significant Factor

The co-operative and patron relationship is the most significant factor in determining whether the bulk of the receipts of co-operatives is subject to income tax. A good number of lawyers, many of them representing co-operatives, seem to feel it necessary to say that the problem must be approached from the standpoint that the relationship is one of agency rather than of buyer and seller.[9] That seems unnecessary because, as the Supreme Court of the United States has pointed out, ownership and control "can have no different tax consequences when clothed in the garb of agency than when worn as a removable corporate veil".[10] The Sales Act and traditional concepts of the common law in the light of all the facts as to the method of operation used by a particular co-operative would furnish the answer as to how the relationship is to be categorized. Then again, the underlying reason for labeling the category would have significance.

On careful analysis it would appear to make no difference as far as the income tax question is concerned whether the transaction between the co-operative and the patron is called a sale or not. The relationship between the parties because of the very nature of co-operative dealings is that the transaction by means of patronage refunds is to be handled without entrepreneur or risk profit. "The patronage dividend device has been woven into the warp and woof of the co-operative system."[11] It makes no difference as to the true relationship, taxwise, whether *A* says to *B* "I make you my agent to sell my wheat, you to receive your expenses and 5 per cent of the selling price", or if he says, "I sell you my wheat for $1000 with the understanding that you will proceed to sell it and refund to me everything you receive over $1000, less your expenses and 5 per cent of the selling price." Surely, there may be differences between the two situations as to the passage of title, risk of loss, rights of creditors and other legal consequences. But so far as profits when *B* sells, how can it be said that *B*'s status is any different in these two situations?

It has been argued that the co-operative and patron relationship is one of self-dealing, and that for that reason no agreement can be effective to allocate the economic benefit so as to mitigate the tax burden.[12] It is true in cases of self-dealing, of which the parent-subsidiary and the family partnership are only a few examples, that mere agreements for the division of future profits are ineffective taxwise. These illustrations, however, are a far cry from the situation where the agreement is made with the very persons whose transactions purportedly produce the profits. Agreements between *A* and *B* as to the distribution of profits resulting from transactions with third persons are entirely different from agreements between *A* and *B*, or *A* and all its customers, with respect to the

Israel Packel, of the Philadelphia Bar, was educated at the University of Pennsylvania. He has been in general practice since 1933, and served as an electronics technician in the Navy from 1943-45. He is the author of *Law of Co-operatives*, now in its second edition. He has been a member of the Association since 1935.

8. *Garden Homes Co. v. Com'r*, 64 F. (2d) 593 (7th Cir. 1933).

9. See Report of the Committee on Classification and Terminology of the Division of Cooperative Corporations (1950) Proc. of the Section of Corporation, Banking and Business Law, page 156 *et seq.* Also see Hanna, Book Review, 3 *Jour. of Legal Ed.* 502 (1951).

10. *National Carbide Corp. v. Com'r*, 336 U.S. 422, 430 (1949).

11. *Bowles v. Inland Empire Dairy Assn.*, 53 F. Supp. 210 (E.D. Wash. 1943).

12. *Supra*, note 3. Other writers have taken the position that the patronage refund system is effective so that the co-operatives are not subject to income tax thereon, O'Meara, "The Federal Income Tax in Relation to Consumer Cooperatives", 36 *Ill. L. Rev.* 60 (1941); Paul, "The Justifiability of the Policy of Exempting Farmers' Marketing and Purchasing Cooperative Organizations from Federal Income Taxes", 29 *Minn. L. Rev.* 343 (1945).

very transactions between them.

Confusion Results from Ignorance of True Nature of Co-operatives

The confusion results from the failure to recognize the true nature of co-operative transactions with patrons. The charges made by a consumer or purchasing co-operative and the original payments made by a marketing co-operative are subject to the understanding that there will be patronage refunds in the form of cash, credits or capital interests. That understanding by virtue of the nature of a co-operative is an essential part of the co-operative and patron relationship. It is to be distinguished from the co-operative and member relationship. The point was made effectively and briefly by Lord MacMillan, in the House of Lords, in *Inland Revenue Commissioners* v. *Ayrshire Association, Ltd.*,[13] which held that the English Finance Act of 1933 aimed to tax undistributed receipts of co-operatives had "missed fire":

> It is not membership or non-membership which determines immunity from or liability to tax; it is the nature of the transactions. If the transactions are of the nature of mutual insurance, the resultant surplus is not taxable whether the transactions are with members or non-members.

The patronage refund is an incident of carrying out the arrangement between the co-operative and the patron that the transaction should be conducted without entrepreneur profit. The farmer could receive for his products $1000 at time of delivery and $200 in the form of a patronage refund, or $800 followed by $400, or $1200 with no patronage refund. In each one of the situations the net position of the co-operative or the farmer is the same. Likewise, the consumer co-operative which sells or orders for a patron a washing machine, is in no different situation so far as profits are concerned, whether it receives $200 and refunds $40, or receives $180 and refunds $20 or makes an initial charge of $160.[14]

An interesting English case decided in 1948,[15] which apparently has received no attention on this side of the Atlantic, raises a very serious question. English and Scottish consumer co-operatives had joined together in the formation of an organization to raise tea in India. The Privy Council held that there could be profits because the nature of the transactions differed from co-operative insurance where the funds are received from, and paid out to, patrons. The case seems to be wrong, historically and analytically, because there is no justification for discrimination solely on a functional basis. What difference does it make whether the co-operative is dealing in insurance policies, spices, wheat, rural electrification, housing or washing machines? The important thing is the nature of the transaction under which it furnishes the economic product or service. The weakness of the English case is made manifest by this response to the point that the actual distribution of patronage refunds would mean that there are no profits:

> Their Lordships are not concerned to discuss that suggestion in this appeal and express no opinion, favourable or unfavourable, on it.

It has been succinctly pointed out: "The patronage dividend is as much a part of the transaction as the price itself."[16] If the patronage refund is an inherent part of the transaction, then whether or not paid in cash, it cannot be entrepreneur profit for the co-operative. Of course, the benefits received by the patron, unless he be a nonbusiness consumer, must be reflected in the income tax returns of the patron.

Mutual and Nonmutual Dealings Must Be Distinguished

Some co-operatives for diverse reasons discriminate between members and nonmembers in their transactions. Manifestly, if the dealing with a nonmember is not on a mutual basis the benefits of the transaction go to someone other than the patron. It might be contended that nonmutual dealings are part of a general understanding to reduce the costs of mutual dealings. Here, however, it is a valid contention that the arrangement is ineffective taxwise since it is an agreement to share profits in dealings with third persons. It is necessary, therefore, in such situations to differentiate mutual and nonmutual dealings and the income received from the latter transactions would be taxable.

Co-operatives are in nonmutual transactions at times with persons other than patrons. Thus, for example, in order to go into larger quarters a co-operative may sell its building and realize a large profit. Then again, marketing or purchasing co-operatives with large reserves may make temporary investments in bonds or other securities. Certainly the returns on such investments representing nonmutual transactions constitute taxable income. These instances, though, are rare and should not be used to draw general conclusions as to the taxability or nontaxability of co-operative receipts.

Under present law, nonexempt co-operatives are liable for income tax to the extent that their receipts are sufficient to permit the payment of a return on capital and to the extent that they have income from nonmutual dealings. Aside from the foregoing, they have no receipts which constitute income because their normal dealings with patrons are on a co-operative basis under which patronage refunds are made in the form of cash, evidences of indebtedness or capital credits.

Congress, undoubtedly, will and should change the existing provisions of the law by clarifying and narrowing the scope of exemptions to co-operatives. Congress, however, should not depart from traditional concepts of income so as to attempt to hit co-operative transactions with patrons which are conducted without entrepreneur profit.

---

13. [1946] 1 AELR 637.

14. For an interesting recent opinion of Judge Goodrich which indicates properly that there may be a difference in the method of operation so far as the fair trade laws are concerned, see *Sunbeam Corp. v. Civil Service Employees Coop. Assn.*, 19 L. W. 2437 (3d Cir. 1951).

15. *English & Scottish Joint Coop. Wholesale Society, Ltd. v. Assam Agricultural Income Tax Com'r*, [1948] 2 AELR 395.

16. *Midland Coop. Wholesale v. Ickes*, 125 F (2d) 618 (8th Cir. 1942).

The Emancipated Judiciary in America:

Its Colonial and Constitutional History

by **R. Carter Pittman** • of the Georgia Bar (Dalton)

■ This is the second half of Mr. Pittman's review of one of the fundamental principles of American government—the existence of courts free and independent of the legislative and executive branches. In this second part of his article, Mr. Pittman concludes his analysis by comparing the ideas of the founding fathers upon the judiciary and those of contemporary statesmen who urge the creation of more and more "quasi-judicial" tribunals by the Congress or the President. The first half of Mr. Pittman's article appeared in the July issue of the *Journal*.

■ From the middle of June until the end of the Constitutional Convention, the constitution-makers, who wanted a government of laws and not of men, were assiduously taking down legislative sails and fastening judicial anchorage onto the Constitution. For example, the words "inferior to the Supreme Court" went in after the word "tribunals"; the appointive power was taken from the Senate and given to the executive with Senate participation, and the fateful words "herein granted" went into the grant of legislative powers in Article I.

Isn't it a mystery that when the constitution-makers struck "tribunal" from the judiciary provisions of the Virginia draft and substituted "courts", they didn't also strike the word "tribunals" in the clause granting legislative power to create them, and substitute "courts"? According to Webster, a "tribunal" is a "person or body of persons having authority to hear and decide disputes so as to bind the disputants". A "court" is a "tribunal established for the administration of justice". "Courts" *would not* but "tribunals" *would* describe all engines of tyranny that had stalked through the pages of history, leaving their trails of maimed and broken bodies and plundered estates. As Gouverneur Morris observed: "The framers of this Constitution had seen much, read much, and deeply reflected. They knew by experience the violence of popular bodies. . . . "[33] The Rhode Island Assembly had taught them the distinction between a "tribunal" and a "court"; so had James I; so had Charles I; so had Cromwell; so had Charles II, James II, and George III, and so had scores of colonial governors.

If the framers had authorized Congress to constitute "courts" "inferior to the Supreme Court", it would have soon found somewhere the implied power to constitute some other "tribunal" servile to its will or the will of some president greedy for power. They had learned to "dread the depravity of human nature".[34] They knew that "jealousy and distrust are the guardian angels who watch over liberty", and that "security and confidence are the forerunners of slavery".[35] So they made that portion of the Constitution so plain a child could understand it and, expressly, authorized Congress to create "tribunals inferior to the Supreme Court", with nonprecarious tenure, so that no tyrant could ever again stalk across the pages of American history.

How could we so soon forget that it was the fear and distrust of state tribunals, servile to legislative power, in some states, that caused the framers to authorize the creation of any federal inferior tribunals at all?[36] Did that distrust of servile state tribunals lead the framers to embrace servile federal tribunals? Were they merely swapping harlots in Philadelphia? The authorizing clause defined the kind and excluded all others. There was no slip of the pen. The word "not" was never intended to be inserted between "tribunals" and "inferior".

Our constitution-makers intended that never again in America should irregular servile tribunals be commissioned and used to effectuate and enforce executive policy. Never again should a Governor Berkeley use such an instrumentality to send scores to the gallows in an orgy of mock trials,

33. 3 Farrand 393.
34. 3 Elliott's, 327.
35. Ford, *Essays on the Constitution* 379.
36. *Federalist*, No. 81; *Cohen v. Virginia*, 6 Wheat. 264, 386. 1 Farrand 124, 125, 2 *ibid.* 46.

courts martial and murders.[37]

Never again should there be such a willing and zealous tribunal as that specially commissioned by Slaughter in New York in 1691 to try and execute Leisler and Milborne;[38] as that handpicked and specially commissioned to try witches in Massachusetts in 1692;[39] as that specially commissioned by Governor Cosby of New York in 1733 as a "court of exchequer" with an "equity side";[40] as that hand-picked and instructed by Lieutenant Governor Clarke of New York in 1741 to try and execute twenty-nine Negroes and three whites to effectuate an executive policy;[41] as that commissioned by Governor Martin of North Carolina in 1773 to try many and execute ten in areas where no regular courts existed by reason of the disallowance of one court bill after another by George II and George III since 1754, because such bills gave to judges tenure during good behavior.[42]

They intended that never again should "special" servile tribunals, such as that created by the Rhode Island Assembly in 1786; those created and extended by Charles I from 1629 to 1640; or such legislative courts as those created under the Commonwealth, be used to effectuate social and economic policies of those in power. They, therefore, *said* that if it is a "tribunal" under Article I, it becomes an emancipated "court" under Article III.

Founders Intended To Create Free Judiciary

They intended that never under this new and untried sovereignty should a judge be dismissed from office for consulting his conscience and his God rather than his President. They, therefore, *said* that all men appointed to serve upon national tribunals exercising judicial powers "shall hold their offices during good behavior, and shall at stated times, receive for their *services,* a compensation, which shall not be diminished during their continuance in office". They therefore *said* that *all* the judicial power of the United States shall be vested in tribunals whose judges hold office by non-precarious tenure and pay. They therefore *said* that "The Judicial power", vested exclusively in such tribunals, *"shall extend* to *all* cases in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made under their authority". They therefore *said* that if "cases" arise in any other manner, such as with respect to ambassadors, etc. or "admiralty and maritime jurisdiction" under laws of some other sovereignty, or the law of nations, "all" such "cases" shall fall within the judicial power thus vested. Govern-

37. Jameson, *Narratives of The Insurrections* 15, *et seq.*, 38-41; 97 (1676) 124, 125; 2 Farrand 46. Of Berkeley even Charles II said: "That old fool has hanged more men in that naked country, than I have done for the murther of my father". Jameson, *op. cit.* 40.

38. Jameson *op. cit.* 392.

39. Burr, *Narratives of the Witchcraft Cases* 199, 373.

40. 6 *Documents Relating to Colonial History of New York* 4. This tribunal was instituted, according to Cosby's report to the Board of Trade, to give "dispatch to business which the King's suits require". It was not to be "inferior to the Supreme Court" of New York, but, like its counterparts in the twentieth century, was to have a different status. Its first case disclosed the reason for every special tribunal in history—"a sneaking job to be done." It was Cosby v. *Van Dam,* in which the Governor himself was seeking to recover half the salary and perquisite of government granted him by the King. Chief Justice Morris of New York held the court to be unconstitutional and was promptly removed by Governor Cosby who named another whose patriotism for promotion exceeded his patriotism for liberty. Peter Zenger took up the battle in his *New York Journal* for an independent judiciary. It was the "false and scandalous libels printed in Zenger's Journal" against Cosby for rendering the judiciary of New York servile to his will that led to his imprisonment, trial and pardon by a jury. 6 *Documents of New York* 4, 5, 11, 14, 20, 42, 43, 89. Rutherford, *John Peter Zenger* (1941) 197. The Zenger case was vastly more than a "freedom of the press" case. It was a "freedom of the judiciary" case. Therefore it involved all human freedoms. When Chief Justice Lewis Morris was called upon by Governor Cosby for a copy of his opinion in the *Van Dam* case, he knew the book was closing on his judicial career. He knew that he had exchanged life's material things and its transient preferments, for the privilege to stand erect and unafraid before his conscience and his God! When he complied with the command of his Governor, he also gave a copy to Peter Zenger. To the opinion was added a note, in part as follows: "... Judges are no more infallible, than their superiors are impeccable: But if judges are to be intimidated so as not to dare to give any opinion but what is pleasing to a Governor, and agreeable to his private views and the people of this Province, who are very much concern'd both with Respect to their Lives and Fortunes in the Freedom and Independency of those who are to Judge of them, may possibly not think themselves so secure in either of them as the Laws of his Majestie intends they should be. . . . As to my Integrity, I have given you no Occasion to call it in Question. I have been in this Office allmost Twenty Years, my Hands were never foul'd with a Bribe; nor am I conscious to myself, that Power or Poverty hath been able to induce me to be partial in the Favour of either of them. And I have no Reason to expect any Favor from you, so I am neither afraid nor ashamed to stand the Test of the strictest Inquiry you can make, concerning my Conduct. I have served the Public faithfully and honestly, according to the best of my Knowledge; and dare and do appeale to them for my Justification." *The Opinion and Argument of Chief Justice Morris,* as printed by John Peter Zenger, in Smith Street, 1733, pages 14, 15. New York Public Library. The story of how this great judge went to England and there won restoration to his judgeship by fanning into flame the dying embers of honor and rectitude in the hearts of the King's Ministers; how his magnitude as a man so impressed them that they offered to divorce the Government of New Jersey from New York and make him Governor of the former; his acceptance, and how he ended judicial despotism in New Jersey by issuing commissions to judges "during good behavior," in 1738, is too long to tell here. It was for the renewal of such commissions, (one of which bore the signature of Governor Lewis Morris, dated 1738) after the death of George II (but before receiving the new Instruction of December, 1761), that Governor Hardy was removed by George III in 1762. 9 *New Jersey Archives* pages 345, 346, 360, 361, 379. Chief Justice John Hunter Morris, Judges Nevill and Salter surrendered their commissions and took commissions "during pleasure" in a futile attempt to save Governor Hardy. 9 *New Jersey Archives* pages 367, 361. His removal stood, "as a necessary example to deter others in the same situation from like Disobedience to Your Majesty's Orders, and as a measure essentially necessary to support Your Majesty's just Rights and Authority in the Colonies . . ." Lest we forget: Gouverneur Morris, whose hand contributed much to the judiciary provisions of the Constitution, was a grandson of Lewis Morris, a nephew of John Hunter Morris and the son of Lewis Morris II, who was for a time Speaker of the New York Assembly. He paid a large part of Andrew Hamilton's fee for representing Peter Zenger, and, after Zenger was acquitted, organized the biggest celebration *(per capita)* that New York City has ever known. John Hunter had been Governor of Pennsylvania for a short time also. 9 *New Jersey Archives* 378. Gouverneur Morris was named after the Gouverneur family of old New York. Abraham Gouverneur was sentenced to hang with Leisler and Milborne by a tribunal servile to Slaughter. Jameson, *Narratives of the Insurrections* 338, 369, 393.

41. 6 *Documents New York* 196, 201 *et seq.*, 213. A "negro plot" to burn down the City of New York, soon became a "popish plot" under Clarke's diversionary tactics. The "popish plot" soon became no "plot" at all, and Clarke confessed to the Board of Trade, after all these executions at the stake and on the gallows, that "great industry had been used throughout the town to discredit the witnesses and prejudice the people against them, and I am told it has had in a great measure its intended effect. . . . *I do not think we are yet got near the bottom of it, when I doubt the principal conspirators lie concealed.*" Clarke also told the Board: "*I desired the Judges* to single out only a few of the most notorious (Negroes and white Catholics) for execution, and that I would pardon the rest." The Board responded, as did Charles II after Jeffrey's return from the "bloody assizes": "We heartily congratulate you." 6 *Documents New York* 196-203, 213.

42. *North Carolina Colonial Records,* Volumes 6, 7, 8 and 9, on hundreds of pages.

mental controversies, state or federal, might arise. They too were made proper subjects for the exercise of the judicial power of the United States. Thus the judicial power of the United States, vested in an emancipated judiciary, was extended to every kind and character of case or controversy known to the framers in 1787, which might be a proper subject for the exercise of federal judicial power. That judicial power not only included but was *extended* beyond proper subjects of federal legislation.

Why were the words "extend to" used in Article III, Section 2 instead of "be limited to"? The judges who posed the "open question" in the *Tidewater* case seem to think it was a slip of the pen, and they think a judicial correction imperative. If the framers had meant to use words of *limitation* instead of words of *extension* they would have done so. Words of limitation were readily found by them for insertion in Article I and there lies the trouble. Since the early days of the Republic, Congress has been endeavoring to slip the words, "herein granted" out of Article I and into Article III. At times the power of the sword has joined the power of the purse in the endeavor. Is that to be accomplished by a judicial correction?

Our failure to take the fatherly advice of George Mason and recur frequently to "fundamental principles" has led us into confusion when considering the judiciary in connection with *limitation of powers*. The "fundamental" is that the legislative makes, the executive executes and the judicial judges the law. If the executive and judicial may only execute and judge that which the legislative makes, then is it not true that the limitations imposed upon the legislative branch by Article I, are *ipso facto* limitations upon the executive and the judicial branches? Since the judicial was to judge of the Constitution, of the laws of nations and the states (in specified instances), it became necessary to insert Section 2 of Article III so as to "extend", (not limit) "the judicial power of the United States", to subjects over which the legislative branch was forbidden to legislate.

The general language of Section 1 of Article III vesting "the judicial power of the United States" in an emancipated judiciary was all that was necessary to coordinate judicial powers with legislative powers. Overcaution caused the framers to attempt to particularize the general powers while *extending* them to additional objects. They feared that the stronger branches of government might become so greedy for powers denied to them by the Constitution as to "jump on" the weaker branch and try to rob it of its powers.

Recapitulation and reiteration were used as devices to make the anticipated assaults more difficult. The historical experience that justified their fears has repeated itself. It is hoped that their wisdom will not be lost forever on a Supreme Court that finds virtue in headlong flight. A third reiteration, with a fourth saying "It all means what it says", would also have been lost on judges that wage furious wars with far-away constables and policemen and defenseless state legislatures, yet who never turn to give battle to those who have usurped powers with the curtilage of the very temple of justice they were commissioned by the people's constitution to defend as trustees for the people. The people gave them the most enviable tenure history has ever known that they might forget themselves and guard the liberties of the people with courage and honor. Indeed, the third and fourth reiterations were substantially added as the ninth and tenth paragraphs of the Bill of Rights. But of what avail is a four-ply "logical net" when a cringing judiciary defines such a simple word as "extend" in Article III, as meaning "limit", while words of *limitation* in Article I are consistently defined as words of *extension*?

The Tribunal Clause of Article I implements and preserves the sanctity of the judiciary. Its language is reiterated in Section 1 of Article III, in order to make it a "logical net". Nevertheless, we are now told that the *Commerce Clause* in Article I, carries a death warrant for the *Tribunal Clause* and that the *Necessary and Proper Clause* is its gibbet, and that the heavenly thing called "social justice" is now to be achieved by the martyrdom of justice. History is to again repeat itself. The martyrdom of justice to "social (ist) justice" has always accompanied the transition of governments of laws to governments of flesh. Governments of flesh have always gone the way of all flesh and always will. In going, a divine retribution has always made the victors of today the victims of tomorrow. We are still digging and excavating in the ruins of ancient civilizations, all of which testify to these truths. Indifference to history and indifference to impartial justice under law, seem always to walk hand in hand leading a deluded people in bankruptcy down the last mile to the graveyard of fallen empires.

It has been often said that the Constitution is bigger than the men who made it and that those who made it didn't understand it. That is true with respect to some, but not all, who helped to make it. Some understood it well and a precious few were bigger. For example, more than half of the amendments to the Constitution, including the last, were insisted upon by George Mason in Philadelphia. The so-called "Father of the Constitution" either did not understand it, or soon lost his high principles along apostasy's low road. After Mason and Henry kept Madison from going to the Senate from Virginia, he, as a lowly member of the House of Representatives, on June 16, 1789, expounded the doctrine "that the meaning of the Constitution may as well be ascertained by the legislative as by the judicial authority",[43] after having decried such a treacherous doctrine as a Constitution-maker. Madison's change of front is but an illustration of the transition that too often takes place

43. 4 Elliott's, 399.

when frail men are shifted from powerless positions to positions of power over men. A constable's badge makes tyrants of some men. A few yards of black cheese cloth makes fools of some, while making others noble and benign. It is no wonder that the Great Master of men, to whom the world had given a Judas, taught us just one simple prayer that begs deliverance from our "temptations", our "trespasses", our "evil", and our hunger for "daily bread", while leaving to our own pitiful wits the phrasing of prayers for things less urgently needed!

As John Marshall fought the *Battle of the Constitution,* many of the Constitution's framers were his adversaries, turned apostates by the accident of changed positions. The havoc wrought by apostasy within the Constitution's first twenty-five years caused Gouverneur Morris to make the priceless revelation that the judiciary provisions of the Constitution were recapitulated and reiterated to make a "logical net" for the "legislative lion". What he said in 1814, as the judiciary was being pulled limb from limb by the "lion", might have been said yesterday:[44]

> But, after all, what does it signify that men should have a written constitution, containing unequivocal provisions and limitations? The legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power which it wishes to exercise, unless it be so organized as to contain within itself the sufficient check. Attempts to restrain it from outrage, by other means, will only render it more outrageous. The idea of binding legislators by oaths is puerile. Having sworn to exercise the powers granted, according to their true intent and meaning, they will, when they feel a desire to go farther, avoid the shame, if not the guilt, of perjury, by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose.

Now let us end this digression and its revolting scenes and go back to the arena in which selfless men out of power were seeking to forge a charter for a free people.

Gouverneur Morris, who favored the executive branch over the legislative in the *struggle for power,* and George Mason, who wished to limit both in his *struggle for human liberty,* reached a partial understanding "out of doors" in the last days of the Convention. Randolph didn't know what hit his "Virginia plan",[45] He was in a fury, striking like a wounded wolf. As he was cooling down, after refusing to sign the Constitution, he wrote the Virginia House of Delegates urging amendments and their aid, "In limiting and defining the judicial power".[46] Even *he* had too much faith in the virtue of men to believe that such might be accomplished someday by "legislative exposition" in the face of a cringing judiciary.

When Randolph returned to Virginia he ran into a thousand questions. Some were embarrassing and unanswerable. Soliloquy tortured him. Finally it dawned upon him that "limiting . . . the judicial power" must necessarily result in the transmission of such power from the clean hands of an emancipated judiciary to state tribunals, some of which were servile and hence unclean, or to the filthy hands of demagogues. He was driven to sack-cloth and ashes. God and history told him that judicial power has never been, and never will be dangerous to human liberty except when *externally controlled.* He no longer insisted upon stoking the boilers of executive and legislative powers with timbers torn from the only haven built into the Constitution for helpless men hotly pursued by arbitrary power. As he supported the Constitution in the Virginia Convention, he was again tortured as he heard John Marshall turn the tide of battle to the side of the "paper on the table" with his encomiums of the independent judiciary set up in that "paper", and its favorable comparison with the emancipated and fearless judiciary George Mason had given to Virginia in 1776.[47]

Who is it, the least familiar with history, that does not know that it was the provisions of the Constitution emancipating the judiciary that saved it from ignominious defeat and gave it final acceptance in the necessary nine states? No President or Congressman would ever have had the opportunity to take an oath to abide by and to "defend" that "paper" if the people had not been convinced that an emancipated judiciary would make them live up to that oath.

Among all the brilliant proponents and opponents of the Constitution throughout the states, not a letter was ever written, and not a word was ever said in the press, or in the debates, either in the Philadelphia Convention or in the several

(Continued on page 632)

44. 1 Elliott's, 507.

45. By the end of August, old George Mason saw that his battle for the rights of men was all but lost in the conflict between two factions, warring over legislative versus executive dominance. He began to draft proposed alterations, handing them to who ever he thought might use them in that raging conflict, ostensibly, so that "the system would be unexceptionable." One proposal was that, "The object of ye national Government to be expressly defined instead of indefinite powers under an arbitrary construction of general clauses." Farrand, Volume IV, pages 56-57. This proposal finally showed up for the first time in Article I in the September 12 draft of the Constitution, embodied in the words, "herein granted." Farrand II, 590. Gouverneur Morris, the leader of the faction warring for executive powers, hit a blow for freedom with that product of Mason's mind. With the legislative branch limited now, for the first time, and an emancipated judiciary established to hold it in check, Mason's proposal for a Bill of Rights was unanimously rejected on September 12 as "unnecessary". Mason's aging mind became a flame. Back to his room at the "Indian Queen", where other proposed alterations flowed from his pen. He was a devining prophet. He knew that emancipated judicial tribunals would have to have secretaries, masters in chancery, trustees, auditors, examiners and others, to assist them in properly exercising the judicial powers of the United States. He knew that they too had to be emancipated from executive and legislative control in order to save the streams of justice from pollution, so he drafted a propsal "to add at end of 2nd clause of 2nd section of 2nd article": "And which shall be established by law but the Congress may by law vest the appointment of such inferior officers as they think proper, in the president alone, *in the courts of law,* or in the heads of departments." Farrand IV, 60. This too was handed to Gouverneur Morris. Morris proposed it on September 15, but overlooked the words "and which shall be established by law." The vote was a tie. Put to vote again it passed. "nem Con." Farrand II, 627. The words, "and which shall be established by law," were on the paper Morris held in his nervous hand. They went into the Constitution when he handed the paper to the Clerk. Mason's effort to get his bill of rights into the Constitution piecemeal after September 12 was defeated at every roll call.

46. 1 Elliott's, 491.

47. 3 Elliott's, 559.

Ultraviolet in Court:

Its Use Is No Longer for Experts Only

by Joseph Tholl • Examiner of Documents (Cleveland, Ohio)

■ Recent developments in the manufacture of ultraviolet lamps now make it possible for a lawyer to make limited examinations of questioned documents himself without the services of experts in that field. In this article, Mr. Tholl describes the technique of using ultraviolet light for a myriad of legal purposes.

> The exhibit is dumb, but as evidence it is most effectual. [*Lauderback* v. *Multnomah County*, 111 Ore. 681 (1924).]

■ The ultraviolet examination of physical evidence has been considered as belonging within the exclusive province of the expert. This idea was propagated largely by the comparatively recent development of the ultraviolet lamp and by the fact that such equipment was confined to criminological and scientific laboratories. With the development of the inexpensive, incandescent type of ultraviolet lamp, which fits an ordinary light socket, it has become feasible for the investigator who is not a trained technician to make a comprehensive examination of physical evidence. Although generally considered an expert's function, the ultraviolet examination, when confined to the comparison and identification of documentary evidence and to the detection of latent evidence, is not an involved operation. The lawyer, since he is frequently confronted with matters pertaining to questioned documents and other forms of physical evidence, will find the black light lamp of great utility in making his own preliminary examinations. It is apparent, however, that the extent and effectiveness of the ultraviolet examination is governed by the familiarity of the examiner with the applications and behavior of this ray with respect to the various forms of evidence.

> . . . In saying that an ordinary individual can frequently arrive at as correct a conclusion as can an expert, it may perhaps be said that there was something of an overstatement of the fact. Certainly in the majority of instances the mind of the expert and trained observer, disciplined to discern not only obvious similarities but to detect as well dissimilarities, disguised under the appearance of similitude, will arrive at a result more correct than will that of the untrained observer. [*Estate of Thomas*, 155 Calif. 488 (1909).]

Ultraviolet rays are a form of invisible radiation which occurs beyond the violet end of the spectrum band and are, because of their unique selective properties, valuable for the examination of physical evidence. While the rays themselves cannot be seen they induce a visible light reaction in irradiated substances causing them to glow with a characteristic color or luminosity. The appearance an object assumes under ultraviolet is determined by its physical and chemical nature. Materials like colored inks and papers which appear the same to the eye but differ in their composition will react differently under black light (as ultraviolet rays are popularly known). The luminous, colored reaction of objects under ultraviolet is termed "fluorescence" and is best observed in total darkness.

Ultraviolet Examination Is Like Chemical Analysis

The great value of ultraviolet rays in the examination of physical evidence is that it is possible to secure results comparable to those obtained through an involved chemical analysis. Instead of making the examination with chemicals which require special handling and are defacing, it is possible in many cases to use the black light lamp which performs the same function quickly and without danger. It thus becomes practical to compare and differentiate papers, colored inks and adhesives without the use of test tubes and bunsen burners and to bring out latent evidence like erasures, stains, fingerprints, etc., without caustic reagents. Where the use of chemicals is forbidden by the court, both infrared and ultraviolet rays provide a safe, analytical and, frequent-

ly, a superior means of examining evidence.

The results of the ultraviolet examination are almost immediately apparent and self-evident, even to the untrained eye. The lawyer in the privacy of his own office and the juror in the courtroom are enabled, by the grace of ultraviolet, to make the equivalent of an involved, chemical examination within seconds with nothing more than an invisible beam of light. As for the evidence revealed, it can be stated that there is nothing that the expert can see that the layman cannot see.

> The highest proof of which any fact is susceptible is that which presents itself to the senses of a court or jury. [*Moore on Facts*, "Weight of Evidence", Section 1206.]

An ultraviolet examination is made merely by observing the typical color or light reaction of an object or substance irradiated with black light. The examination takes the form of identification through a distinctive reaction; a comparison between several specimens for the purpose of differentiation or identification; the observation of latent evidence which is rendered visible by fluorescence.

Ultraviolet rays act by selectively bringing out physical facts that cannot be discerned by the unaided eye. A spurious imitation will fluoresce differently from a genuine standard because of differences in materials. On the other hand a suspected document such as one of the pages in a will or an agreement will fluoresce the same where the paper and other writing materials are identical. Like materials having the same physical and chemical aspects will give identical reactions to verify their genuineness while unlike materials, even though appearing the same, will fluoresce differently to indicate dissimilarity or fraud. The sensitivity of the human eye through being extended by ultraviolet can observe and detect conditions such as an erased and redrawn ledger line, fraudulent interlineations, erasures, washed out blood stains, old scars, obliterated tattoo marks, and others, all of which manifest themselves in a characteristic and sometimes spectacular fashion. Substances which are invisible in ordinary light will by reacting visibly to ultraviolet rays reveal evidence which might otherwise be overlooked.

The Ultraviolet Lamp as a Legal Instrument

A preliminary black light examination might enable the lawyer to spot a fraudulent document produced by a dishonest or mistaken client as well as to uncover new, unsuspected channels of investigation. The following typical cases can be cited. A cognovit note upon which judgment had been rendered was found to contain, when examined by ultraviolet rays, an erased rubber stamp impression of the word "PAID". ...After being submitted for collection against an estate a promissory note was seen to have been chemically treated to simulate age and wear. ...When photographed with ultraviolet rays a questioned deed containing visible alterations was discovered to bear other and earlier erasures and alterations which were deciphered to the satisfaction of the court. ...A receipt for six thousand dollars introduced as an exhibit in the Cuyahoga Probate Court was seen to contain interlineated typewritten additions which fluoresced differently from the original typewriting on this instrument.

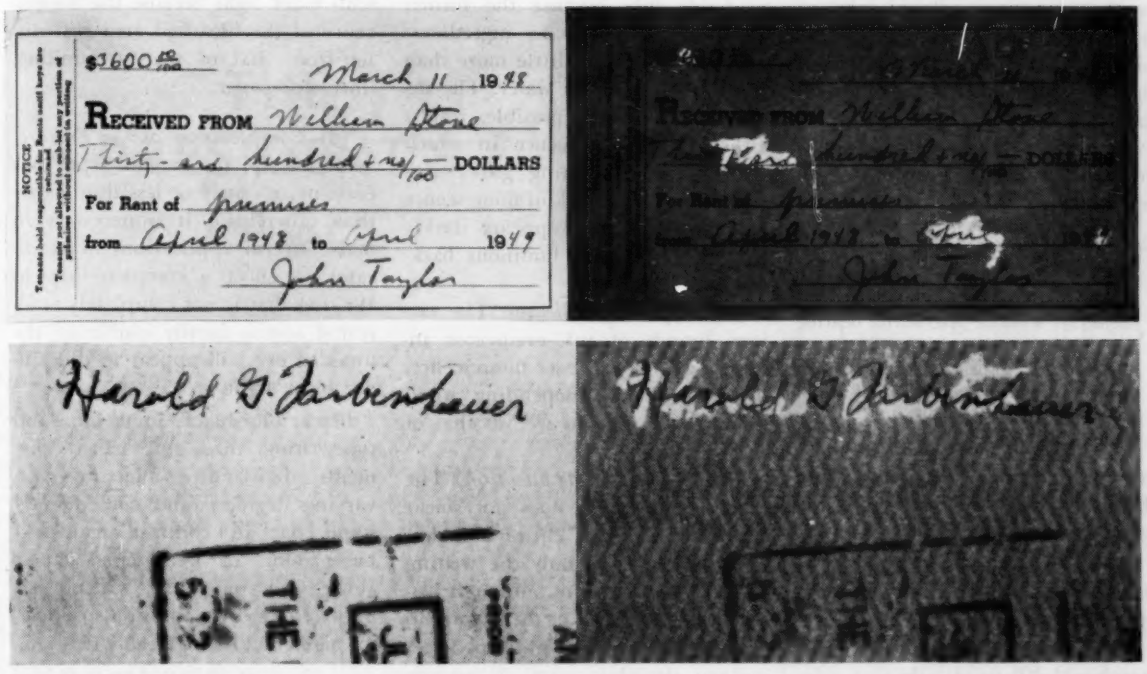
Less than a decade ago the black light lamp was an expensive and often a cumbersome instrument. With the development of the economical, incandescent lamp no larger than a 75-watt bulb, the use of ultraviolet is no longer restricted by expense or size. This type of lamp is sold under the trade names of "Black Bulb", "Purple X", "Black Light" and can be operated from a standard 110-volt A. C. socket. Since these lamps should be used no more than fifteen minutes at a time the use of two lamps, to be operated alternately, is advised. This economical and potent lamp is a boon to lawyers, bankers, investigators and others who are enabled to make their own black light examinations with little trouble and expense.

Ultraviolet rays like radio waves are classified into long and short wavelengths each of which is adapted for specific kinds of evidence. These two *groups* of wavebands (long and short wave ultraviolet) are generated by two different types of lamp. The incandescent black light lamp, already described, emits long-wave ultraviolet and is recommended for documentary work since it is most effective for organic substances like inks, papers, adhesives, etc., and is not harmful to the eyes. The more expensive short wave ultraviolet unit is better adapted to minerals, inorganic substances and is dangerous to use without protective goggles. The complete examination by the specialist includes the use of both long and short wave ultraviolet radiation since conditions that do not respond to one often do to the other.

The manner in which an irradiated substance or object fluoresces is, to the informed, a key to its nature or identity. These modes of optical behavior on the part of physical evidence are definitely characteristic and can be described and classified as follows:

1. There is a luminous colored reaction. Some objects when irradiated with invisible ultraviolet rays glow with a distinctive color or luminosity. Imperceptible stains on documents and cloth are outlined in tell-tale color; secret and eradicated writing appears in glowing characters; drab-appearing minerals and dyes fluoresce in brilliant colors ranging from violet to red. Some substances go on glowing even after the lamp is turned off (phosphorescence). Since various materials emit a characteristic fluorescent reaction which is determined by their physical and chemical nature, the ultraviolet lamp has been well suited for documentary and other evidentiary examinations where ordinary light is misleading or confusing.

Objects to be compared under



Top: (a) Ordinary photograph of suspected receipt; (b) the same receipt under ultraviolet reveals chemically erased matter. Bottom: (a) Ordinary photograph of suspected endorsement; (b) here ultraviolet rays bring out evidence of prior erased endorsement.

ultraviolet should be, if their common identity is presumed, in the same physical condition, otherwise errors resulting from differences in fluorescence are likely to result. For example, it was found that old lipstick stains affected by bodily secretions appeared somewhat darker under the lamp than the same lipstick freshly applied. Papers and some inks affected by exposure will fluoresce differently from identical materials that are unaffected. On the other hand, the sensitiveness of black light to differences in composition and condition works against the forger who succeeds in matching the appearance of a document but who does not use identical materials.

2. There is a Negative Response. Many substances do not react to ultraviolet rays. This negative response is nevertheless valuable because it sometimes allows the inert substance such as an eradicated ink to stand out in sharp relief against a lighter, fluorescing background. There are cases where chemical and mechanical erasures become quite legible by contrast against a surrounding, luminous paper surface.

3. Latent evidence becomes visible. Ultraviolet, through exciting a luminous response in some forms of latent evidence, causes substances that would otherwise remain hidden to stand out clearly. Chemical and mechanical erasures, secret-ink writing, erased cancellation marks and fingerprints, by reacting visibly to black light, make their presence known. There are cases where latent fingerprints and eradicated writing can be seen under ultraviolet only after the application of an appropriate reagent. Where latent evidence fluoresces in short invisible wave lengths special photography must be employed.

Total Darkness Is Best for Examination

Since many fluorescent reactions are faint or delicate it is advisable to make the examination in total darkness. Where an ultraviolet demonstration is to be given as a part of testimony in the courtroom, the court or jury should remain in a darkened room for about five minutes before viewing fluorescent effects. It is for this reason that ultraviolet photographs which can be viewed in the lighted courtroom are to be preferred to direct visual observation.

Ultraviolet rays are superbly adapted to the examination of questioned documents because they differentiate unlike substances that appear identical in ordinary light, identify some materials through a distinctive fluorescence, and bring out latent or obscure evidence. Inasmuch as the black light analysis of documents is largely a matter of simple comparisons, identifications and the bringing to light of hidden conditions, it is possible for anyone with normal eyesight to utilize this instrument, to detect physical facts, and to form reliable conclusions. In the courtroom the juror and the court are enabled to make their own observations and verify and test the ultraviolet findings of the expert witness.

Since the various documentary factors such as chemical and mechanical erasures, tampered seals and

envelopes, papers, colored inks, secret inks, stains, etc., fluoresce in a highly typical manner under black light, a specific description of the behavior in each case will enable the examiner to detect and evaluate more readily any reaction he might encounter.

Chemical Erasures

> But the real inquiry was whether a check could be altered by the use of chemicals without afterwards bearing any evidence of alteration. This was a question for solution by expert evidence. [*Birmingham National Bank* v. *Bradley*, 23 S. 53 (1897).]

The effectiveness of ultraviolet rays in detecting and deciphering chemical erasures of ink writing depends upon the following conditions:

(a) *Composition of Eradicated Ink.* Permanent type inks containing iron pigment can be, when chemically eradicated, more effectively deciphered with black light than most washable inks because the former are comprised of many ingredients while the latter are little more than a solution of dye in water. The decipherment, where possible, results either from fluorescence in which the eradicated writing glows visibly, or by a total lack of fluorescence where the erasure appears darkly against the lighter, luminous background of paper.

(b) *Type of Eradicator.* The various brands of ink eradicator induce a greater or lesser fluorescence, or none at all, depending upon their composition as well as that of the paper and ink.

(c) *Manner of Application.* The experienced forger does not smear eradicator over an entire area but is careful to erase only the writing itself. This procedure, although better hiding evidence of the erasure to the eye, makes it possible to detect and to decipher such an erasure with black light because the fluorescence of the bleached area will differ from that of the surrounding, untreated paper.

(d) *Completeness of the Erasure.* Some of the permanent type inks erase more slowly or less thoroughly than others and it is necessary to make several applications of eradicator to effect a complete bleach. Writing that is not completely eradicated and is faintly visible to the unaided eye will appear legible under black light.

Black, blue-black, some blue and typewriting inks and pencil pigments absorb ultraviolet rays (in varying degrees) and consequently stand out in contrast against a background of fluorescing paper. Where ink or pencil writing has been removed by abrasion, particles of pigment are invariably left em-

(Continued on page 537)

Professor Paul G. Kauper

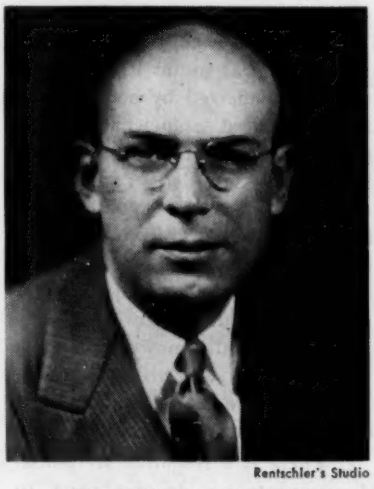
Wins 1951 Ross Essay Contest

■ The winner of the 1951 Ross Essay Contest is Professor Paul G. Kauper of the University of Michigan Law School. The twenty-five hundred dollar prize awarded pursuant to the terms of the bequest of the late Judge Erskine M. Ross will be presented to Professor Kauper during the Annual Meeting in New York City next month. The subject of this year's competition was "The First Ten Amendments: The Character, the Status, and the Relative Importance and Dignity of the Rights Guaranteed Thereby".

Professor Kauper has been a member of the Association since 1945. Born in Richmond, Indiana, in 1907, he was admitted to practice in Indiana in 1931, in New York in 1936 and in Michigan in 1946. He began his teaching career in 1934 when he was made part-time instructor in law at the University of Michigan, and, after a two-year interval for practice in New York City, he returned to Michigan as Assistant Professor of Law in 1936. He has been a full professor since 1946. His special interests are bills and notes, constitutional law, public utilities, municipal corporations and taxation. He is the author of various law review articles on constitutional law and taxation matters.

The Ross Prize Contest is an annual competition conducted by the American Bar Association. It is open to all members of the Association except previous winners, members of the Board of Governors, officers and employees of the Association.

Professor Kauper is the eighteenth winner of the competition which has been held each year since 1934.



Rentschler's Studio

PROFESSOR PAUL G. KAUPER

THE PRESIDENT'S PAGE

Blakeslee Studio

CODY FOWLER

■ During July I tried to complete my visits to bar associations which had been kind enough to request my attendance at their meetings. It was an interesting and busy month.

On July 1, after attending the meeting of the Montana Bar Association at Butte, I flew by private plane to Sun Valley, where the Idaho State Bar was meeting. Incidentally, many of the western states select the most delightful places to hold their meetings, which makes attendance doubly pleasurable. On July 4 I returned to Butte, where I joined James T. Finlen, immediate past President of the Montana Bar, and with him and his family enjoyed a few memorable days in the Canadian Rockies. On this trip, by agreement we refused to think of anything that might produce worry. In this effort for complete relaxation, we were most successful.

Following this short vacation, I visited Seattle and the Annual Meeting of the Seattle Bar Association. While there I made a trip to Mt. Rainier with Frank E. Holman, former President of the American Bar Association, and the efficient and attractive Executive Secretary of the Washington State Bar Association, Miss Clydene Morris. Those of us who had the good fortune to attend our Annual Meeting in 1948 will long remember the hospitality of Seattle. I was already familiar with the country, having served in the United States Army as an artillery officer at the then Camp Lewis some wars ago.

My next stop was Portland, Oregon, where I visited the bar association and had the pleasure of meeting many of the judges and lawyers of Oregon. My visit there included a trip up Mt. Hood where we had dinner at Timberline Lodge with the officers and official families of the Oregon State and Multonomah County Bar Associations.

From Portland I went to San Francisco, using the Golden Gate City as a headquarters while I visited the following bar associations: San Francisco, Fairfield-Suisun and Santa Clara County Bar Associations at San Jose, and the Alameda County Bar Association in Oakland. I also visited the U. S. Naval Base at Mare Island and other places of beauty and interest in the Bay region. It was a pleasure to visit San Francisco and enjoy the hospitality of the people in this popular city.

Retiring on a sleeper plane on the evening of July 29, I awakened over the enchanted Island of Oahu and received the traditional welcome lei. I enjoyed my visit with the Honolulu Bar Association. From Hawaii I am due to set sail by air for New Zealand and Australia, with the anticipation of a pleasant and interesting experience. I shall give a report of this trip in my last President's Page in the September issue.

It is hard for me to believe that there could be anyone more accustomed to living out of a suitcase than I am—I was not at home during the last two weeks of June or during the month of July.

The next annual Congress of the Union Internationale des Avocats (Paris, France) will be held in Rio de Janeiro, September 7-12, 1951. The American Bar Association should be represented at this meeting by at least ten members—five delegates and five alternates. If you are interested in attending this meeting as a delegate from the American Bar Association, I should appreciate it if you will communicate with me at once.

Recently there has been a great deal of comment and discussion in the press and otherwise regarding the proper selection of lawyers for appointment to the federal Bench. This is one of the most important duties of the appointing authority. The proper selection of lawyers of ability, character and standing for the Bench is essential to maintaining the confidence of the people in our judiciary. This confidence is vital to the welfare of our nation. Lawyers obviously are in the best position to investigate and to make recommendations for the Bench. I am proud to say that no recommendation of the American Bar Association for appointment to the federal Bench has ever been influenced by personal, partisan or political consideration. I am sure the public knows this and has faith in our recommendations.

I have just received the plans of the Joint Committee for Entertainment during the forthcoming Annual Meeting in New York City. I urge all of you to read it. While it reveals only a part of the planned program of entertainment, it gives you some idea of what a delightful occasion this will be for both the lawyers and their ladies. The program for the meeting is now taking definite shape and I am sure it will be a most satisfactory one. Our Annual Meeting is well worth attending. Remember, if you wait until a time when everything is ideal to make a trip, you always stay at home.

Adieu! I am off for down under!

AMERICAN BAR ASSOCIATION

Journal

General Subscription price for non-members, $5 a year.
Students in Law Schools, $3 a year.
Price for a single copy, 75 cents; to members, 50 cents.
Members of American Law Student Association, $1.50 a year.

EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

Bar Associations and Judicial Qualifications

For many years bar associations, including the American Bar Association through its Standing Committee on the Federal Judiciary, have concerned themselves with qualifications of candidates for the Bench—not in the furtherance of the ambitions of any particular candidate, but in a desire to have the courts manned, in the public interest, by the most able, honest and courageous judges—all in the highest tradition of the administration of justice by independent courts, as contemplated in the Constitution. Because of the desire to avoid interference with the executive prerogative in appointing judges, this investigating and advisory function of bar associations, whether by qualified committees or by secret ballot of members, has been exercised primarily to prevent the selection of unqualified or little qualified judges rather than to prevent the appointment of any person who is qualified.

In the nature of things, associates in any profession are able to bring to bear on persons in the profession unique and highly relevant criteria that are well recognized by the public to be of considerable value.

It is indeed gratifying that many Presidents and governors have solicited or welcomed this professional screening of candidates for judicial office in the public interest.

This function of the Bar, well understood by lawyers and informed laymen, has never been more ably expressed than by *The New York Times* of June 30, 1951, in an editorial entitled "Mr. Truman on Judges" (reprinted here by permission), and reading as follows:

"On June 11 President Truman nominated Miss Frieda Hennock, New York lawyer and member of the Federal Communications Commission, for federal judge in the district court. She was reported to have 'considerable local political support.' On June 12 the president of the Association of the Bar of the City of New York and the chairman of its judiciary committee declared in the name of the association and on the basis of prior inquiry by that body that she was 'totally unqualified' to be a United States judge. A few days later the American Bar Association took the same position, repeating that Miss Hennock was 'totally unqualified.'

"This subject came up on Thursday at President Truman's press conference. In our reporter's words, the President 'brushed aside' bar association opposition to Miss Hennock; he had no intention of withdrawing her name; he had appointed plenty of good judges opposed by the bar associations; such opposition, he went on, doesn't mean anything in his young life; he was glad to have bar association approval of judiciary appointees when it cared to give it, but failure to endorse a prospective judge would not deter him from making an appointment.

"Putting aside the question of Miss Hennock's fitness, we take exception to Mr. Truman's comments. Working in the courts as they do, being court officers indeed, the highly respected lawyers who serve as officers and key committee members of bar associations are the best equipped to pass upon court nominees who come from the ranks of fellow-lawyers. The President's flippant dismissal of their opinion as of no interest to him—if it disagrees with his own—is in itself evidence of poor judgment.

"Since the President cannot possibly examine personally the qualifications of all nominees to the bench, it is necessary for us to ask whose judgment he substitutes for that of bar associations. If the answer to that question is that he relies on the advice of political leaders we cannot endorse such a substitution."

LONDON LETTER

H. A. C. Sturgess • Librarian and Keeper of the Records, Middle Temple

■ The Middle Temple has been much in the news lately, probably by reason of the fact that the restoration of the historic Hall of that Society has made it possible to resume its prewar functions. The first "occasion" was the revival of the Reader's Feast on November 10, 1950. In earlier days it was the duty of Readers at the Inns of Court to satisfy themselves that students had sufficient knowledge of law to justify their call to the Bar and, although efficiency is now judged by examinations held under the auspices of the Council of Legal Education, the holding of a Reader's Feast continued until the war made it impossible. The Reader's Feast in the old days frequently involved the Reader himself in heavy expenses. It is on record that he kept a special table in Hall, and frequently was called upon to add extra dishes at other tables, styled "exceedings". All this in addition to his Reader's Feast which, with other entertaining during his three weeks of reading might cost as much as £600 (probably £6,000 according to present day values). It is not surprising that the less wealthy of the fraternity paid a fine, heavy though that was, rather than face possible ruin by becoming Readers. It was early realized that such extravagance could not be continued and, in the year 1680, public readings were abolished, and, instead of a great feast, the Reader paid the sum of £200 into the Treasury of the Inn.

Her Majesty has, on several occasions recently, been entertained by her fellow Benchers. She was present on Grand Day on November 20, 1950, when she dined as a Bencher of the Inn. On the following day their Majesties the King and Queen, together with the princesses, Queen Juliana and Prince Bernhard, attended a government reception in the Middle Temple Hall. They were greeted by the Treasurer of the Inn, and by their official host and hostess, Mr. and Mrs. Bevin. For the occasion the Hall was floodlit from the outside, which showed up the rich beauty of the stained glass in the windows.

Fraudulent Mediums

A bill has been introduced in the House of Commons to repeal the Witchcraft Act, 1735, and to make, in substitution for certain provisions of Section Four of the Vagrancy Act, 1824, express provision for the punishment of persons who fraudulently purport to act as spiritualistic mediums or to exercise powers of telepathy, clairvoyance or other similar powers. It provides that any person, who with intent to deceive, purports to exercise such powers as above, or uses any fraudulent device, shall be guilty of an offence. But only where such person acts for reward. A person shall be deemed to act for reward if any payment is made in respect of what he does, whether to him or to any other person. Anyone found guilty of an offence under the section will be liable on summary conviction to a fine not exceeding fifty pounds, or to a term of imprisonment not exceeding four months, or both such fine and imprisonment. On conviction on indictment the fine goes to a maximum of five hundred pounds and the imprisonment to two years, or both. Proceedings for an offence cannot be brought without the consent of the Director of Public Prosecutions. Anything done solely for the purpose of entertainment is excluded from the provisions of the bill.

Etiquette of Cross-Examination

The General Council of the Bar has approved the following ruling on professional etiquette with regard to cross-examination: (1) In all cases it is the duty of the barrister to guard against being made the channel for questions which are only intended to insult or annoy the witness or any other person, and to exercise his own judgment both as to substance and the form of the questions put; (2) *Cross-Examination which goes to a matter in issue:* in such cross-examination it is not improper for counsel to put questions suggesting fraud, misconduct or the commission of any criminal offense, (even though he is not able or does not intend to exercise the right of calling affirmative evidence to support or justify the imputation they convey), if he is satisfied that the matters suggested are part of his client's case and has no reason to believe that they are only put for the purpose of impugning the witness's character; (3) *Cross-examination as to credit only:* Under the rules of evidence, affirmative evidence cannot in general be called to contradict answers given to questions asked in cross-examination directed only to credit. Questions which affect the credibility of a witness by attacking his character, but are not otherwise relevant to the actual enquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the questioner is well founded or true. A barrister who is instructed by a solicitor that in his opinion the imputation is well founded or true and is not merely asked to put the question, is entitled *prima facie* to regard such instructions as reasonable grounds for so thinking and to put the question accordingly. A barrister should not accept the statement of any person other than the solicitor instructing him that the imputation is well founded or true, without ascertaining so far as is practicable in the circumstances, that such person can give satisfactory reasons for his statements. Such questions should only be put if in the opinion of the cross-examiner, the answers would, or might, materially affect the credibility of the witness; and if the implication conveyed by the question relates to matters so remote in time, or of such a character that it would not materially affect the credibility of the witness, the question should not be put.

"Books for Lawyers"

LAW AND PEACE. *By Edwin D. Dickinson. Philadelphia: University of Pennsylvania Press. 1951. $3.25. Pages 147.*

Dr. Dickinson writes an interesting and an informative book dealing with the shortcomings of international law, its possible amelioration through present practices and the necessity for the full development of international organization, which may limit the so-called sovereignty of nations so that the domain of international law may now cover the many wide gaps that exist. That, "Organized force for the coercion of great powers, without more, is an oversimplification", and "a desperately hazardous oversimplification" (page 146) he is confident.

The author believes that peace and international law are indispensably linked in the everlasting struggle of humanity against unreason. In the first paragraph of his Foreword he says:

> Apparently all or most of its inhabitants want peace.

Whether this sweeping generalization is true or not depends upon our appreciation of the march of history. It may well be that the inhabitants of the world generally do wish for peace, but certainly they do not always wish for the methods which lead to peace, and especially for those methods which would require the national relinquishment of many of the objectives which appeal to the appetites or passions of men.

The first chapter of the book deals with "The Community of Nations" and criticizes the tendency of lawyers to deal in juristic abstractions, and instances the wide divergence in size, population, culture and economic interests of the sixty nations now comprising that Community: a heterogeneous lot indeed.

This is an interesting chapter emphasizing, as it does, a fact so often overlooked by publicists, that each nation has its own peculiar interests, which may differ from those of other nations, and that in dealing with nations as mere legal abstractions we may reach disastrous results in practice.

Dr. Dickinson very aptly refers to what may be called "men's minds" and to the generally believed opinion that:

> . . . communication, travel, trade, and an expanding exchange in the realms of art, science, and invention may tend progressively to level cultural diversities among the nations. (Page 26).

Yet, he says:

> . . . Reactions to comprehension may be quite the contrary. We cannot forecast with assurance what the Slav will do with American industrial machines, or the Chinese with Western political ideas, or the Arab with oil and the salvage of empire. Cultural differences are deeply rooted in land, race, and history. (Page 27).

In very apt summations of international situations affecting international law, the author indicates both deficiencies in that law and also the inability of men to apply it to many situations by reason of the doctrine of sovereignty. He concludes that there has been a strong resistance to anything approaching effective organization.

In a separate chapter the author treats of the growth of the law through arbitration, conciliation and diplomacy, and criticizes some of the results reached as unhappy and inconclusive; but others as more successful because they considered the situation in more concrete fashion, and were mindful of the different conditions existing between nations.

In his concluding chapter he insists upon the necessity of international organization, which may remedy the deficiencies of international law by obviating the necessity for having to consider the factor of national sovereignty.

Dr. Dickinson highly commends the commitment of the Charter to bring about peace in conformity with principles of justice and international law; but he admits that this is a hard and a long road to travel and that there is no panacea or easy way to reach this objective. The gaps in international law are pointed out and certain ameliorations suggested from the standpoint of a liberal who would not allow the doctrine of sovereignty to interfere with the application of general principles providing for fundamental rights of man and such matters as the suppression of the crime of genocide by treaty provision.

Law and Peace well sums up the difficulties which confront the world in its endeavor to solve problems through international law. The real truth seems to be that the causes that make for war are not so much in the deficiencies of law as in the attitude of those nations, or their rulers, who do not wish to resort to legal solutions, but who prefer to work their will through a resort to force.

Differences among the nations of the world cannot be settled by law unless there is a prevailing public opinion among them that the diplomatic or judicial solution is preferable to the use of force. Since 1815 this has been the actual experience of the English-speaking people. It may be many generations before all the other nations of the world acquiesce in resolving their differences through legal precedent and legal organs.

As our author properly concludes:

> . . . There are no easy and simple solutions. The more enduring peace is not to be implemented in halting expedients or bought with dollars, or even

enforced with arms. Increasingly it must be waged in execution of a well-planned and an embracing strategy. Increasingly it must be waged with law. (Page 147).

Let us not deceive ourselves. No restatement of law by jurists, or even international commissions, can be of any more practical avail than can the formulation of ideal declarations of the rights of man; to think otherwise is to cherish and further delusion.

It is useless to blame international law or to think that, even if it were perfected from the standpoint of the theorist or jurist, we would be much better off. Unless the dominant powers of the world, who, in the end, make international law, are willing to subordinate their own supposed immediate interests to the rule of law, it is an error to think that any such result can be brought about by lawyers and publicists—however learned and upright.

Man has proved his ability to destroy himself. Only the future can tell whether he possesses sufficient morality and intelligence to preserve himself and the civilization which he has created.

FREDERIC R. COUDERT
New York, New York

THE NATIONAL ECONOMY IN TIME OF CRISIS: ITS MEANING TO LAWYERS AND THEIR CLIENTS. *A Series of Economic Lectures Before the New Jersey State Bar Association. Baltimore: Lord Baltimore Press. Copies made available by New Jersey State Bar Association as a public service. Pages 87.*

In the early months of 1951, the New Jersey State Bar Association undertook something new in the way of meetings for its members. It sponsored a series of lectures dealing with the economic facts of life confronting this nation as it girds for the new Armageddon which Korea has thrust upon it. The lectures, given by outstanding economists of the eastern seaboard, were followed in each instance by a question-and-answer period during which the assembled lawyers sought to draw the last possible ounce of down-to-earth enlightenment from their guest speakers.

The lecture course was a notable success and other bar associations began making inquiries about the project. In due course the officers of the New Jersey organization decided to publish the lectures in book form and make them available to others who are interested. This decision was spurred not a little by the generous offer of a prominent New Jersey business institution to underwrite the distribution of a sizeable number of the volumes to a large, select list of the nation's leaders in the law, in education and in business, and to members of Congress and others in official life.

The six lectures comprising this little book make easy reading. For one thing, they are the handiwork of men who speak and write lucidly and well on economic subjects. Moreover, the book's sponsors happily decided to include in it a generous sampling of the questions and answers which followed each lecture. This gives the text a certain dramatic spiciness, for the impromptu exchanges between the speakers and their audience tended to draw out facts and ideas of a kind which would not find their way into the written pages of a prepared lecture.

The lecture series was designed to answer some very practical questions which today are lodged deep in the minds and hearts of the nation's lawyers. What economic implications does the new American garrison state hold for the practicing lawyer and for his clients? Are government controls over the national economy really necessary and, if so, to what extent must they be exercised? How will they affect business policies and operations, investment practices, employer-employee relationships, and the economics of daily family living? And above all, what will our garrison economy mean in terms of human freedom? For as Chief Justice Arthur T. Vanderbilt of the Supreme Court of New Jersey points out in his foreword to the book, "Lawyers have traditionally been the exponents of individual freedom. Whatever freedom our citizens have today has in large measure been created and preserved by lawyers and judges."

The freedom of our people, Mr. Justice Vanderbilt goes on to say, is under attack on three fronts today: by enemies abroad, by curtailments at home necessitated by war conditions, and by the threat of inflation which, he contends, offers the greatest peril of all. "It will do us little good", he says, "to struggle to maintain individual freedom if inflation destroys our economy and leaves the individual citizen hopelessly dependent on an impoverished state. If inflation occurs, we shall find ourselves fighting for the shadow of liberty after having lost its substance."

The need for us to make common cause against this greatest of enemies is underscored in the answer given by the first lecturer, Dr. Marcus Nadler, to the very first question put to him by a member of his New Jersey audience. The question was, "What can I do as an individual to minimize the consequences *to myself* of inflation?", to which Dr. Nadler replied:

"After long and careful study I have reached the conclusion that against inflation there can be no individual security unless there is collective security. The individual cannot protect himself against inflation unless society as a whole protects itself against inflation. It is not conceivable that one individual can hedge against inflation and that the great multitude of people, finding their savings dwindling, are going to take it lying down."

Each of the six lectures covered some phase of the general theme of the series, which was, "The National Economy in Time of Crisis: Its Meaning to Lawyers and Their Clients". Dr. Nadler's lecture, entitled "What the Garrison Economy Means", provided an appropriate introduction to the series, particularly so because of his uncommon ability to make economic terms and situations crystal clear to laymen. Following Dr. Nadler's lecture came two by Dr. Walter E. Spahr—"Economic Im-

plications of Government Spending" and "Monetary Policies and Inflation"; then two by the noted labor economist, Dr. Leo Wolman—"The Labor Outlook in the Garrison State" and "Wage Policy in a Period of Rearmament". Henry Hazlitt's lecture "Capitalism and Our Economic Goals", concluded the series.

A review of the lectures discloses substantial agreement among the four economists in basic matters, such as the major economic difficulties and dangers confronting the nation as it gears anew for all-out war production; the impact of these production efforts on living standards, particularly the living standards of the white collar classes; the increase of bureaucratic power over the activities of private businesses and professions alike; and the need to get at the heart of the inflation problem by controlling the volume of money and credit, balancing the federal budget, and maintaining as high a level of civilian production as defense priorities will permit.

All four economists agree that price and wage ceilings are palliatives at best in the nation's effort to combat inflation. Nadler, nevertheless, believes they "are bound to be imposed". Spahr sees little chance of making wage and price controls work as long as we maintain our present system of managed currency. Wolman gives wage and price ceilings small chance of remaining effective in the light of the practical realities of the labor situation. Hazlitt maintains that price controls do more harm than good even in wartime, since they open up a Pandora's box of evils, including the discouragement of some lines of essential production.

It is to be kept in mind, of course, that the members of the New Jersey State Bar Association were not staging a debating tournament on economic theories. What they were after —and what they got—was a presentation by seasoned experts of the hard, cold facts about contemporary economic problems which have given increasing concern to them both as practicing lawyers and as citizens in a democratic society. It is reported that the lecture meetings were exceptionally well attended, and the question periods following the lectures were exciting from start to finish. The experience demonstrated that a working knowledge of economics is a handy asset in a law office these days and may well become an indispensable one in days to come.

ALVIN A. BURGER
Washington, D.C.

ESSAYS ON FEDERAL REORGANIZATION. *By Herbert Emmerich. University, Alabama: University of Alabama Press. 1950. $2.50. Pages xii, 159.*

If it be true that, figuratively speaking, men in these days make their living by taking in each other's washing, it is also true then to an increasingly greater degree that managers make their living by managing other managers. Thus, what the author of these essays refers to as the science of administration has emerged as a growing and important area of activity.

Administration is indeed important, much as we may shudder at the prospect, and it is of the greatest importance in the field of government. Perhaps it is not too pessimistic a view of the future to accept the premise that big government is here to stay and that it will continue to affect the lives and activities of all of us in a direct and intimate way. If, then, we can no longer fully accede to the proposition, "that government is best which governs least", we may as an alternative hopefully assert "that government is best which governs least wastefully and most efficiently". For those who have arrived at this point, these five essays are of considerable significance.

We have here no merely pedantic and theoretical approach to the problems of federal reorganization. Those who have at any time been even on the fringes of federal bureaucracy will know that the author has been in the center of things and that he has a first hand and intimate acquaintance with the facts of life as lived in the government service. To experience he adds perspective and to perspective, principle. The sum total is a penetrating analysis of the shortcomings of federal administrative organization together with a number of concrete suggestions for improvement.

Since the book as a whole may be read in a sitting, a recapitulation of its contents is unnecessary. The central theses seem to be that the office of the President should, as concluded by the President's Committee on Administrative Management in 1937, provide continuous and positive management of the whole executive establishment; that the position of the executive should be strengthened and clarified and that there should be periodic investigations of the whole structure of government. The author is careful to point out his opposition to excessive executive power but regards the preservation of independent legislative and judicial branches together with freedom of speech and of the press as being sufficient safeguards against dictatorship.

To lawyers the most significant thing about the book is what it leaves out. There is virtually no consideration of what members of the legal profession are likely to think of as "administration"—the regulatory work of governmental agencies. What comment there is, is somewhat disconcerting, as, for example, the statement, "A somewhat regressive tendency is evidenced in the Administrative Procedure Act of 1946".[1] It is also said: "Whatever may be the merits of the commissions, their development of administrative adjudication on a large scale has caused a substantial dissipation of the President's ability to supervise the execution of public policy."[2]

I think it is fair to say that these statements are indicative of a typical attitude on the part of experts in administrative organization toward the restraints which judges and lawyers have placed on the process of administrative adjudication and rule-making. Arising from a perfectly honest desire to promote efficiency

1. Page 9.
2. Page 36.

and to create direct lines of executive responsibility, the position taken, nevertheless, raises serious problems as to the place which the concepts of due process are to have in areas where personal and economic interests are made subject to governmental control. Perhaps, as suggested by the President's Committee,[3] a merger of the regulatory commissions in the executive department, with a retention of autonomy in the performance of adjudications, is a partial solution. It might be noted in this connection that in the Department of Agriculture this has actually occurred, since the Department has an independent judicial officer who performs adjudicative functions vested in the Secretary by statute. Be this as it may, governmental reorganization should not proceed without thorough and joint consideration of such problems as these by management experts and members of the legal profession.

CHARLES B. NUTTING
Pittsburgh, Pennsylvania

SELECTED ESSAYS ON FAMILY LAW. *Compiled by the Association of American Law Schools. Brooklyn: Foundation Press. $9.50. Pages 1122.*

One who is interested in any phase of family law—marriage, divorce, property rights, personal rights—is pretty sure to find something of interest and value to him in this 1100-page volume containing sixty-six comparatively recent essays and references to over 300 more.

The essays have been selected by critical committees of the Association of American Law Schools headed by Paul Sayre, of the State University of Iowa, and was nearly ten years in the making. For the most part they emphasize less what the law is than why it is and how it operates. A considerable number are more philosophical and sociological than legal in nature.

Included are writings by legal scholars of world renown, such as Pound and Wigmore, sociologists such as Ogburn and Lichtenberger, and spiritual authorities such as the Federal Council of Churches and Pope Pius XI; also quite a number of law teachers known personally to many readers of the JOURNAL.

For anyone with any considerable practice in domestic cases, to every judge who hears any kind of family cases, and to everyone concerned with problems of family life, these essays contain many a nugget of wisdom and helpfulness.

P.W.A.

PROCEDURE BEFORE THE BUREAU OF INTERNAL REVENUE. *By Edgar J. Goodrich, of the District of Columbia, Iowa, Minnesota and West Virginia Bars, and Lipman Redman, of the District of Columbia and Pennsylvania Bars. Published by the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association, 133 South 36th Street, Philadelphia 4, Pennsylvania. 1951. $2.00. Pages 157.*

This book should be in the library of every lawyer—the more experienced tax lawyer as well as the general practitioner. It is an excellent treatment, replete with useful ideas and suggestions, on the highly technical subject of procedure in handling a tax case before the Bureau of Internal Revenue.

This book is the most recent publication of the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association. Incidentally, it is the second of a trilogy which deals with the ordinary problems involved in a federal income tax matter, beginning with the preparation of the return and ending with litigation. First is the previously published *Legal Problems in Tax Returns,* and in preparation is the *Litigation of Tax Cases.*

Like all of the Committee's publications, this book is written as a practical procedural guide. It brings together in one place for the first time much material which previously could only be found after many hours of research. Then as if the foregoing alone weren't sufficient to warrant its place in one's library, it contains, in addition, many practical suggestions with regard to the step-by-step handling of a tax case before the Bureau. It therefore serves two purposes and serves them well. It demonstrates to the general practitioner in an easy-to-understand manner what makes the wheels go 'round in the Bureau. It tells him what he must and can do at the various stages in order to protect the taxpayer's rights and to present his position most effectively in dealing with the various Bureau personnel. To the more seasoned tax lawyer, it succinctly presents all this information in one convenient place, together with practical suggestions many of which may not have been apparent heretofore.

The book appropriately opens with a presentation of the over-all organizational structure of the Bureau and with instructions for one's admission to practice before it. As stated in the book: "A full understanding of practice and procedure before the Bureau of Internal Revenue necessarily calls first for a general conception of the Bureau's work." Some basic Bureau procedures are then explained, such as acquiescence and nonacquiescence as to decisions of the Tax Court; internal, confidential "actions on decisions" issued for the guidance of Bureau personnel; Treasury decisions; mimeographs; income tax rulings; general counsel memoranda and special rulings issued by the Bureau in response to a written request from a taxpayer for an expression of the Bureau's opinion on a particular set of facts. Fortunately for the reader, the subject of obtaining special rulings on prospective and certain types of consummated transactions is subsequently considered in detail in the book as this is a most valuable privilege available to the taxpayer and his counsel in the handling of tax problems—procedure which is too often overlooked.

With the foregoing as background, the book then turns its attention to

3. See Page 112.

the type of return likely to be most frequently encountered in practice before the Bureau, namely, the income tax return, and, in a step-by-step fashion, traces it through the collectors' and agents' offices and the Technical Staff. In making this journey there are discussed among other things the different types of audit; selection of cases for audit; audit procedure; conferences and settlements with the agent; the thirty-day letter and protest; conferences and agreements with conferee; statutory notice of deficiency (ninety-day letter); conferences and settlements with the Technical Staff in both nondocketed and docketed cases; and procedure in the event of no settlement with the Technical Staff. Throughout these steps, appropriate emphasis and consideration is devoted to the important practical problems, such as the arguments for and against the execution of certain forms, the advantages and disadvantages of settlement at the various stages, the alternatives in the event of no agreement, and the best means of effectively presenting your case to the various Bureau personnel.

Inasmuch as a separate and basically different procedure has been established for the purpose of processing fraud cases which involve possible criminal prosecution, the book next discusses in the same thorough manner the procedures and problems incident to the handling of such cases. The voluntary disclosure policy is considered and the question of cooperation or of noncooperation is discussed. The operations of the Office of the Special Agent in Charge, Penal Division and the Department of Justice are explained, and practical suggestions for dealing with representatives of these offices are indicated.

The book concludes with a detailed discussion of a number of miscellaneous but highly important procedures. These cover such matters as special rulings, closing agreements, offers in compromise, claims for refund, assessment and collection, and computation of interest.

As stated in the conclusion of the book: "The road was long, but its successful completion makes the trip that much more satisfying and the work accomplished along the way that much more accurate and complete. Although occasions of seeming frustration and endless delay may appear numerous—they probably are—most of the stops and corners have some logic and purpose. Their proper understanding, theoretically the reader's good fortune if he has progressed this far, should perhaps result in more adequate representation of taxpayers before the Bureau and thereby the latter's more efficient administration of the internal revenue laws."

It is apparent that this review, necessarily limited in scope, has amounted to little more than a catalogue of the contents of this book. It could not hope to convey the wealth of experience revealed in its pages. This book should serve as a valuable source book for every lawyer. The Committee on Continuing Legal Education is indeed to be complimented for making this publication possible.

DARRELL D. WILES
St. Louis, Missouri

BANKRUPTCY AND ARRANGEMENT PROCEEDINGS.

By John E. Mulder and Leon S. Forman. Published by the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association. 1951. $2.00. Pages 139.

Once again has the Committee on Continuing Legal Education extended its co-operative hand to the American Bar. Through institutes presented by leading lecturers and publications prepared by outstanding authorities, this committee of the American Law Institute, collaborating with the American Bar Association, is briefing the general practitioner on current developments in various important branches of jurisprudence. "The aim of the venture is to supply literature and constant training to lawyers in all types of communities. The Committee offers its co-operation to state and local bar groups, law schools and interested organizations."

Its most recent contribution is this, its pamphlet *Bankruptcy and Arrangement Proceedings.* Like the other eleven publications of its Series One and Two, the subject matter is treated practically and with "a considerable amount of emphasis on the 'how to do it' approach to legal problems".

The authors are at least men of experience, if not also of distinction, in the field of bankruptcy. They bring to the book their combined experience in teaching, writing and practicing and have produced a handbook on bankruptcy law that can well supplement the working library of every lawyer.

Its announced objectives are twofold. "It is a procedural guide as to the conduct of straight bankruptcy and arrangement proceedings, and it is a basic text on those two aspects of the Bankruptcy Act." Well indeed, does it fulfil its primary procedural function, and, considering its avowed limitations, it also contains substantive content (including the 1950 amendments to Sections 60a and 70c) directive to more detailed research.

The format of presentation follows the continuity suggested by and used in actual practice. The orthodox bankruptcy portion begins with the sources and bibliography of the law and covers the matters of the creation, powers and jurisdiction of bankruptcy courts; who may become a bankrupt; how to initiate a voluntary and an involuntary bankruptcy proceeding; the proceedings after commencement; the duties of the bankrupt; notices; proof and allowance of claims; collection of the estate, including title of the trustee, turnover and reclamation proceedings; debtor's exemptions; distribution of assets; proceedings relating to discharge; compensation, fees and allowances; and a special treatment of partnership insolvencies.

In the same way is treated the matter of arrangements or compositions through bankruptcy. The pres-

entation of this chapter (XI) of the Bankruptcy Act is so streamlined and simplified as to tear away the shroud of mystery that so many lawyers have, unwarrantedly, imputed to this very helpful and constructive branch of bankruptcy law. Hereby is demonstrated that the general practitioner need have no fears to undertake an arrangement proceeding, and that the Bankruptcy Act provides for simple, informal machinery for rehabilitating unfortunate business enterprises. Individuals, partnerships and corporations may, under Chapter XI of the Act, be salvaged and restored to solvency, rather than be thrown out of business and liquidated.

The detailed table of contents does much to counterbalance the absence of an index. The temptation is too strong to resist to mention that the authors were probably misled by Collier's (Manual, page 4) incorrect statement that "General Order 10 requires a deposit to cover the expense of sending out notices and . . ." (page 19). General Order 10 now restricts such demands to procuring the attendance of witnesses or in perpetuating testimony.

This pamphlet will prove useful to the general practitioner who only occasionally participates in a bankruptcy proceeding because it is a handy, step-by-step guide of how to proceed. When the going gets complicated or rough he will need a more extensive treatise. Within its limitations of 130 pages on straight bankruptcy, and eight pages on arrangements, it is a worthwhile contribution to such of the legal literature as is helpful to the American Bar. Every lawyer can well afford to have this publication in his library.

CHARLES E. NADLER
Mercer University
Macon, Georgia

WATER RESOURCES LAW. *By The President's Water Resources Policy Commission. Superintendent of Documents, Washington, D. C. 1951. $2.25. Pages 777.*

The three large volumes comprising the Report of the President's Water Resources Policy Commission, recently published, are of great importance to the nation. The third volume, *Water Resources Law,* February, 1951, is invaluable to lawyers who are called on to advise or to litigate with regard to the law of water, private or public, or on any phase of the subject. This is the only compendium yet published on the law of water; it cites all federal statutes, treaties, executive orders, public laws, congressional hearings, with an analysis of many if not most, and summarizing the laws of seventeen states. It was prepared by the diligent efforts of eleven capable specialists in the legal field under the direction of the Commission and of its general counsel, Bernard A. Foster, Jr., who states that this survey groups the laws on the basis of the functional purpose served: navigation, flood control, irrigation, hydroelectric power, water supply, reclamation, drainage, pollution, land uses, fish and wild life, and other purposes. All these subjects are related, as for instance flood control and power. The bodies of the law are comparatively summarized; and there is a summary of each chapter except the last. Chapter 19 of Volume I has a summary of all of Volume III.

These numerous acts of Congress and of state legislatures need to be unified and correlated if there is ever to be an integrated national water resources program. The need for such a program has been discussed in the United States for 150 years by Presidents, congressional leaders and committees, official commissions, etc. There is yet lacking such a unified policy. These three volumes issued by this Commission functioning under the able chairmanship of the distinguished engineer, Morris Llewellyn Cooke, announce in detail the outline of such a national policy for water resources development, with seventy specific recommendations, unanimously agreed upon by the seven-member Commission. The first volume of 445 pages, called a General Report, was published in December, 1950. The second volume of 792 pages, entitled "Ten Rivers in America's Future", was published in February, 1951.

The importance to the American people of this work cannot be overstressed. The Government has spent billions of dollars on specific projects in this field. It is to spend nearly a billion and a quarter in 1951, and has authorized the expenditure of twelve billion more. The Commission finds that our nation is on the threshold of a tremendous increase in construction for federal water projects.

CHARLTON OGBURN
New York, New York

Additional Contributions to Regional Meetings

The Association is glad to acknowledge the contribution of $250 by Callaghan and Company to the Dallas Regional Meeting and of $75 by Prentice Hall to the Atlanta Regional Meeting. For these generous contributions and those of other law book publishers announced in the June issue at page 443 we are most grateful.

Review of Recent Supreme Court Decisions

CONSTITUTIONAL LAW

Conviction of Special Police Officer for Obtaining Confession by Illegal Means Upheld

■ *Williams* v. *United States,* 341 U. S. 97, 95 L. ed. Adv. Ops. 524, 71 S. Ct. 576, 19 U.S. Law Week 4213. (No. 365, decided April 23, 1951.)

A lumber company in the City of Miami hired Williams, a private detective, to investigate numerous thefts of its property. This case and its companion cases, Nos. 26 and 134, reviewed at pages 604 and 606 of this issue, arose out of charges that Williams, two of his assistants, and a member of the Miami police force took certain of the employees of the company to a shack on the company premises and obtained "confessions" from them by so-called "third degree" methods.

In this case, Williams was indicted under Section 20 of the Criminal Code, 18 U.S.C. (1946 ed.) §52, 18 U.S.C. (1950 ed.) §242, which provides in part: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both." Williams was convicted in the District Court and the Court of Appeals affirmed. The main issue before the Supreme Court on certiorari was Williams' contention that the application of Section 20 so as to sustain a conviction for obtaining a confession by force and violence was unconstitutional because Section 20 was too vague. He pointed to decisions of the Supreme Court where the Justices were closely divided on whether state action violated due process, arguing that if the Court could not agree on the standard, police officers "walk on ground far too treacherous for criminal responsibility".

Mr. Justice DOUGLAS delivered the opinion of the Court affirming. He holds that it was clear that Williams was acting "under color" of law within the meaning of Section 20, citing his status as a special police officer of the City of Miami and the presence of a regular police officer at the investigation. As for the argument as to vagueness, Mr. Justice DOUGLAS says that "A narrow construction will often save a statute from vagueness that is fatal." The present case is a good illustration, he says, for while there may be doubt as to the legality of police methods of obtaining confessions in some cases, there is no doubt here. "This is the classic use of force to make a man testify against himself", he said. It "strains at technicalities to say that any issue of vagueness of §20 as construed and applied is present in the case".

Mr. Justice BLACK dissented.

Mr. Justice FRANKFURTER, Mr. Justice JACKSON and Mr. Justice MINTON dissented for the reasons set forth in the dissenting opinion in *Screws* v. *United States,* 325 U.S. 91, noting that "Experience in the effort to apply the doctrine of that case" led to their dissent here.

The case was argued by Philip Elman for respondent, and Bart A. Riley for petitioner.

CONSTITUTIONAL LAW

State Court Judgment Upholding Requirement of Oath for Candidates for Public Office Affirmed on Understanding that Oath Required Is Limited to Denying Attempts To Overthrow Government by Force and Violence

■ *Gerende* v. *Board of Supervisors of Elections of Baltimore City,* 341 U. S. 56, 95 L. ed. Adv. Ops. 495, 71 S. Ct. 565, 19 U. S. Law Week 4209. (No. 577, decided April 12, 1951.)

In a *per curiam* opinion, it was stated that this was an appeal from the Maryland Court of Appeals which denied appellant a place on the ballot for a municipal election on the ground that she refused to file an affidavit required by state law. The opinion says that the Court reads a decision by the Maryland court to limit the scope of the required affidavit to an oath that the candidate is not engaged "in one way or another in the attempt to overthrow the government by *force and violence*" (italics appear in the opinion) and that he is not knowingly a member of an organization engaged in such an attempt. The Attorney General of Maryland declared at the bar of the Court that he would advise Maryland authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. The judgment is affirmed under these circumstances and with this understanding, the opinion announces.

Mr. Justice REED concurred in the result.

The case was argued by Duke Avnet and William H. Murphy for appellant, and by Hall Hammond and J. Edgar Harvey for appellee.

CRIMES

Judgment of Court of Appeals Reversing Conviction Affirmed Without Concurrence of a Majority of Court as to Grounds—Discussion of Coverage of 18 U.S.C. 241 Respecting Conspiracy To Injure Citizen in Exercise of Constitutional Rights, *Res Judicata* and Definiteness of Statute

■ *United States* v. *Williams,* 341 U. S. 70, 95 L. ed. Adv. Ops. 508, 71 S. Ct. 581, 19 U. S. Law Week 4215. (No. 26, decided April 23, 1951.)

This case is a companion to Nos.

Reviews in this issue by Rowland L. Young.

134 and 365 reviewed at pages 604 and 606. Williams and the three other petitioners were, among others, indicted under Sections 19 and 20 of the Criminal Code of the United States, 18 U.S.C. (1946 ed.) Sections 51 and 52, 18 U.S.C. (1950 ed.) Sections 241 and 242. Williams was convicted and the other defendants were acquitted on the substantive charges of violation of Section 20 (Williams' conviction being the conviction sustained by the Court in No. 365 reviewed above) and a mistrial was declared under the Section 19 conspiracy indictments as to all the defendants. The four petitioners were then retried and convicted under Section 19, the applicable portion of which reads: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . . with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined . . . etc." The Court of Appeals for the Fifth Circuit reversed.

Mr. Justice FRANKFURTER delivered the judgment of the Supreme Court affirming and an opinion in which the CHIEF JUSTICE, Mr. Justice JACKSON and Mr. Justice MINTON joined. Basing his opinion "on the history of [Section 19,] its text and context, the statutory framework in which it stands, its practical and judicial application", he says that Section 19 "only covers conduct which interferes with the rights arising from the substantive powers of the Federal Government". Previous decisions have drawn a distinction between rights "which Congress can beyond doubt constitutionally secure against interference by private individuals", which are protected by Section 19, and "rights which the Constitution merely guarantees from interference by a State", which are protected by Section 20, he explains. The conspiracy indictment fails, therefore, he says, since the section upon which it is based does not relate to interference by state officers with rights which the Federal Government merely guarantees from abridgment by the states. Such interference can be reached under Section 20 and the general conspiracy statute, he says, pointing out that defendants were tried under Section 20 and that the conviction of one of them under that section is sustained in No. 365.

Mr. Justice BLACK wrote a concurring opinion in which he says that the retrial of defendants under Section 19 should have been barred by *res judicata*. "In the first trial the judge instructed the jury to convict on the substantive counts all defendants who either committed that crime or aided, abetted, assisted, counselled, encouraged, commanded, induced, procured or invited any other person to do so. Acquittal of the . . . defendants was, therefore, a final determination that they had done none of these things . . . " he said. "[T]here is no evidence that they conspired except insofar as the unlawful agreement can be inferred from their having participated in some way in the substantive crime" he said, pointing out that three of the defendants were acquitted of such participation and that there was no evidence that Williams conspired with any one except the other defendants. This would necessarily free Williams from guilt in the conspiracy trial since a person cannot conspire with himself.

Mr. Justice DOUGLAS wrote a dissenting opinion in which Mr. Justice REED, Mr. Justice BURTON and Mr. Justice CLARK joined. He does not agree with Mr. Justice FRANKFURTER's interpretation of the scope and purposes of Sections 19 and 20, he says, and he can find no trace in the legislative history of Section 19 of a purpose to limit its coverage only to rights "secured" by the Federal Government against invasion by private persons. That section has in fact been applied to the protection of Fourteenth Amendment rights, and attempts that have failed "did so not because Section 19 was construed to have too narrow a scope, but because the action complained of was *individual* action, not *state* action", he declared. Section 20 applies only to those who act "under color" of law, while Section 19 reaches "two or more persons" who conspire to injure any citizen in the enjoyment of constitutional rights and privileges, according to his view, and in this particular, he says that the reach of Section 20 is shorter than that of Section 19; he declares that this offers no comfort to defendants in the present case because it "cannot be doubted that state officers . . . who conspire to wring confessions from an accused by force and violence, are included in 'two or more persons' within the meaning of Section 19". As to the *res judicata* point raised in Mr. Justice BLACK's concurring opinion, Mr. Justice DOUGLAS says that respondents may have conspired to do the act without actually aiding in its commitment, and that the acquittals on the substantive counts by no means established that the jury rejected all the evidence against the defendants. The evidence may have been insufficient to show that all defendants participated in execution of the crime, he says, but overwhelmingly clear that all were members of the conspiracy that conceived it.

On the analogy of *Screws* v. *United States*, 325 U. S. 91, he would reject the alternative conclusion of the Court of Appeals that Section 19 is too indefinite to be enforceable.

The case was argued by Philip Elman for the petitioner, and by John D. March for respondent, Ford.

INSURANCE

State Statute Requiring Insurance Companies To Underwrite Auto Liability Insurance Policies for Persons Unable To Procure Such Insurance Through Ordinary Means Upheld Over Claim of Violation of Due Process

■ *California State Automobile Association Inter-Insurance Bureau* v. *Maloney*, 341 U. S. 105, 95 L. ed. Adv. Ops. 496, 71 S. Ct. 601, 19 U. S. Law Week 4211. (No. 310, decided April 23, 1951.)

The appellant in this case was an unincorporated association analogous to a mutual insurance corporation. It refused to subscribe to a "Compulsory Assigned Risk Law" of the State of California by which it was required to accept some of a class of motor vehicle operators in California who were classified as poor risks by the insurance companies and who did not possess enough resources to get a surety bond or make a cash deposit as required by California law to obtain a license to drive an automobile in that state. The State Insurance Commissioner suspended appellant's permit to transact automobile liability insurance in California. Appellant contested the suspension by proceedings against the commissioner in the California courts. Its claim that the Compulsory Assigned Risk Law violated the due process clause of the Fourteenth Amendment was denied by the District Court of Appeal (see 36 A.B.A.J. 573) and the California Supreme Court refused to grant a petition for hearing.

On appeal to the United States Supreme Court, Mr. Justice DOUGLAS delivered the opinion of the Court affirming. He notes that premiums charged by the Association can be commensurate with the greater risks of the insurance it is required to write by the state statute and that the question of confiscation is not a factor in the case. He says that the statute provides for equitable apportionment of the assigned risk among all insurers so that appellant is not required to serve all comers and that uninsurable risks are eliminated from the plan and policies issued may provide limited coverage under the statute. "The case in its broadest reach is one in which the state requires in the public interest each member of a business to assume a *pro rata* share of a burden which modern conditions have made incident to the business", he says. The police power of the state "extends to all the great public needs", he continues, and may be utilized in the aid of what the legislature deems necessary to the public welfare. The "power of the state is broad enough to take over the whole business, leaving no part for private enterprise" in the insurance business—a business in which the government has long had a "special relation", he declares. The state may therefore stay its hand on condition that local needs be serviced by the business.

It was noted that Mr. Justice BLACK would have dismissed the appeal on the ground that the constitutional questions were frivolous.

The case was argued by Moses Laskey for appellant and by Harold B. Haas for appellee.

INSURANCE

Brother by Adoption Decree Held To Be Within Permissible Class of Beneficiaries under NSLI Act

■ *Woodward* v. *United States*, 341 U. S. 112, 95 L. ed. Adv. Ops. 500, 71 S. Ct. 605, 19 U. S. Law Week 4228. (No. 476, decided April 23, 1951.)

Petitioner brought this action to secure the proceeds of a National Service Life Insurance policy taken out by Evelyn Haizlip, a member of the Women's Army Corps. He had been designated as beneficiary and described as the service woman's "brother"; her husband was interpleaded as a conflicting claimant. The question was whether a brother by virtue of an adoption decree is within the permissible class of beneficiaries under Section 602 (g) of the National Service Life Insurance Act of 1940.

The Supreme Court reversed the District Court and the Court of Appeals, which awarded the proceeds to the husband, in a *per curiam* opinion. An examination of the Act, its legislative history and related statutory provisions sheds no light, it is said. "The short of the matter is that Congress has not expressed itself in regard to the question before us", the opinion declares. The Court decides against restricting the policyholder's choice of beneficiaries to brothers of blood. "Contemporaneous legal treatment of adopted children as though born into the family" is a manifestation of the policy against such a restriction, the opinion declares.

The case was argued by Claude T. Wood for petitioner, and by Flavius B. Freeman for respondent.

PERJURY

Dismissal of Counts of Perjury Indictment on Grounds of Former Jeopardy, *Res Judicata* and Incompetency of Tribunal Where Testimony Given Held Erroneous

■ *United States* v. *Williams*, 341 U. S. 58, 95 L. ed. Adv. Ops. 502, 71 S. Ct. 595, 19 U. S. Law Week 4225. (No. 134, decided April 23, 1951.)

This case and Nos. 134 and 365 reviewed at page 604 are companion cases. In the instant case the Government appealed from the dismissal by the United States District Court of an indictment for perjury alleged to have been committed in the trial which resulted in the conviction affirmed in No. 365.

The indictment in the case in which the allegedly false testimony was given charged the four appellees Williams, Ford, Bombaci and Yuhas, (a) in four counts with the substantive crime of violation, or aiding and abetting the violation, of Section 20 of the Criminal Code of the United States 18 U.S.C. (1950 ed.) §242, 18 U.S.C. (1946 ed.) §52, in that they deprived certain persons of rights secured by the Fourteenth Amendment and (b) in four counts with conspiracy to violate 18 U.S.C. (1950 ed.) §241, Section 19 of the Criminal Code 18 U.S.C. (1946 ed.) §51, in that they conspired to injure certain persons in the free exercise of rights secured by the Fourteenth Amendment.

Upon the trial under the indictment in the case where the testimony was given Williams was found guilty on the substantive charge, the other three were acquitted on the substantive charge and the jury disagreed as to all four defendants on the conspiracy charge under Section 19.

It was later held, however, that Section 19 did not apply to the general rights extended to all persons by the Fourteenth Amendment.

This result was reached by the Court of Appeals on an appeal from a conviction under a later but identical conspiracy indictment where the Court of Appeals reversed the District Court and was affirmed by the Supreme Court in No. 26.

The perjury indictment involved in the instant case contained certain counts charging Williams, Ford, Bombaci and Yuhas with perjury (a) in the trial of the four substantive counts in the case where the testimony was given and (b) in the trial of the four conspiracy counts in that case.

The District Court had dismissed the perjury indictment on the ground that none of the instances where false testimony was alleged to have been given could be the basis for a valid charge of perjury. (1) All the instances where Williams testified with respect to the substantive charges were disposed of upon the ground that, since he had been found guilty on the substantive counts at the trial where the testimony was given, to convict him on the perjury charge would constitute double jeopardy. (2) All the instances where the other defendants testified with respect to the substantive charges were disposed of upon the ground that the acquittal of those defendants on the substantive charges at the trial where the testimony was given barred a perjury conviction in the instant case. (3) All the instances where Williams and the other defendants testified with respect to the conspiracy charges were disposed of on the ground that there was no jurisdiction to try any of the defendants on the conspiracy charges at the trial where the testimony was given, since the second and identical conspiracy indictment had been held not to state an offense by the Court of Appeals and hence the allegedly false testimony had not been given before a competent tribunal. All the instances of perjury charged against any of the defendants thus being disposed of, the District Court dismissed the perjury indictment. The instant case was an appeal from that dismissal.

The opinion of the Supreme Court reversing was delivered by Mr. Justice REED. He says (1) that no double jeopardy is involved in trying Williams for perjury committed during the trial at which he was convicted of a substantive offense. "Obviously perjury at a former trial is not the same offense as the substantive offense", he declares, and "[i]t is only an identity of offenses which is fatal". "It would be no service to the administration of justice to enlarge the conception of former jeopardy to afford a defendant immunity from prosecution for perjury while giving testimony in his own defense", he observes.

(2) As for the District Court's holding that the charge of perjury against the other defendants was *res judicata* in their favor by virtue of their acquittal on the substantive charges, Mr. Justice REED says that the perjury alleged here was defendants' testimony that they had not seen Williams abusing certain prisoners. He says that acquittal on a charge of aiding or abetting was not a determination that no defendant saw Williams abusing the prisoners and that the District Court erred in holding that "whether they had seen or observed Williams beat the victims was part and parcel of the charge against them in the substantive counts".

(3) Turning to the District Court's third reason for dismissing the indictment, Mr. Justice REED says that the District Court was in error in ruling that the court that tried the case where the testimony was given without jurisdiction because it was later held by the Court of Appeals that an identical indictment did not state an offense. The testimony was given before a court which had jurisdiction of the subject matter of the former case, he said, and, of course, of the persons charged. The trial therefore took place before "a competent tribunal", he said. A determination on appeal that an identical indictment was defective did not affect the jurisdiction of the trial court to try the case presented by the indictment, he declared. He holds that "where the court in the trial where the alleged perjury occurred had jurisdiction to render judgment on the merits in those proceedings, defects developed *dehors* the record or in the procedure, sufficient to invalidate any judgment on review, does not make a subsequent conviction for perjury in the former trial impossible".

Mr. Justice BLACK and Mr. Justice FRANKFURTER dissented.

The case was argued by Philip Elman for the United States and by Ernest E. Roberts and John D. Marsh for appellees.

International Tracing Service

■ The Director of the International Tracing Service of the International Refugee Organization has notified the Association that I.T.S. is now prepared to issue certificates to former prisoners of concentration camps established by the Nazis both in Germany and in countries they occupied between 1939 and 1945. This service is attempting to notify lawyers who are looking after the interests of former concentration camp inmates. An application form for a certificate can be obtained by writing to International Tracing Service Headquarters, International Refugee Organization, APO 171, United States Army, Germany.

Courts, Departments and Agencies

E. J. Dimock • EDITOR-IN-CHARGE

Constitutional Law . . . personal, civil and political rights . . . state cannot lawfully try, convict and punish a person brought within its jurisdiction by the force and violence of its officers . . . under exceptional circumstances question may be raised for first time in *habeas corpus* proceedings in U.S. District Court.

■ *Collins* v. *Frisbie,* C.A. 6th, May 28, 1951, 189 F. (2d) 464, Martin, C. J.

A petition for writ of *habeas corpus* alleging that petitioner was illegally arrested and maltreated in Illinois by two Michigan police officers who forcibly kidnaped him and returned him to Michigan where he now was imprisoned was denied by a federal district court. On appeal the Court reversed and remanded the case for a hearing on the merits of the petition.

It was argued that the decision did not conform to the rulings of the Supreme Court in *Mahon* v. *Justice,* 127 U.S. 700, and *Ker* v. *Illinois,* 119 U.S. 436. These two cases held that no federal question was presented when a prisoner was wrongfully abducted from one state and carried to another to be tried for an offense against the state to which he was carried. However, the Court pointed out that they were decided before the enactment in 1932 of the national Anti-Kidnaping Act, amended in 1934, 18 USC §408a. This statute condemns the transportation in interstate commerce of any person unlawfully seized, confined, kidnaped, or carried away by any means whatsoever and "held for ransom or reward or otherwise". The Court said: "A state may not lawfully try, convict and punish a person brought within its territorial confines by force and violence exercised by its officers in violation of a federal criminal statute. The courts of the United States should uphold the constitutional guarantee of due process of law by all appropriate means within their lawful powers, including issuance in last resort cases of the writ of *habeas corpus.*"

In a footnote the Court expressed its view that there were exceptional circumstances which rendered previous denial of a petition for certiorari to the Supreme Court unnecessary under *Darr* v. *Burford,* 339 U.S. 200.

Miller, C. J. dissented, believing that petitioner had not exhausted his state remedies as required by *Darr* v. *Burford.* He also thought the application too late since the point was available but was not raised in the state court proceedings under which the prisoner had been tried and sentenced. No opinion was expressed on the question discussed by the majority.

Contempt . . . proceedings for punishment . . . attorney for plaintiff in trespass suit need not answer questions regarding his membership in and affiliation with Communist Party.

■ *Matter of Schlesinger,* Pa. Sup. Ct., June 7, 1951, 81 A. (2d) 316, Drew, Ch. J.

In this action petitioner attorney was granted a writ of prohibition restraining a trial judge from holding him unfit to practice law or in contempt of court for refusing to answer questions regarding his membership in the Communist Party. When petitioner appeared as counsel for the trial of a trespass case, the trial judge cleared the courtroom of all parties and witnesses and proceeded in the presence of newspaper reporters and others to question petitioner concerning his communist affiliations. After petitioner failed to answer these questions the judge refused to permit him to leave the courtroom and declared him in contempt of court and "morally unfit" to try the case because he did not possess "an allegiance to the United States".

The Pennsylvania Supreme Court held that the judge was without jurisdiction to inquire into petitioner's communist affiliations, deprive him of the right to practice his profession, and hold him in contempt. The questions propounded, the Court stated, were completely unrelated to the trial of the trespass case.

The Court then mentioned its decision in *Commonwealth of Pennsylvania ex rel. Alice Roth* v. *Musmanno,* 72 A. (2d) 263, in which a judge was held to be without legal justification in dismissing a grand juror from service because he concluded she was a Communist. Chief Justice Drew also noted Canon No. 34 of the Canons of Judicial Ethics adopted by the American Bar Association for the proposition that a judge's conduct should be above reproach.

The Court concluded: "What the Judge has done, in his zeal against communism, is to adopt the detestable method employed by communists themselves in arbitrary and unjudicial proceedings contrary to all our cherished traditions of law and legal procedure."

Courts . . . federal jurisdiction . . . federal district courts have jurisdiction of suits by International Refugee Organization under the International Organization Immunities Act which authorizes international organizations "to in-

EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

stitute legal proceedings" and under 28 USC §1331 which gives them jurisdiction of civil actions arising under the "Constitution, laws or treaties of the United States".

■ *International Refugee Organization* v. *Republic Steamship Corp.*, C.A. 4th, May 11, 1951, Parker, C. J. (Digested in 19 U.S. Law Week 2560, May 29, 1951).

For lack of jurisdiction the District Court had dismissed a suit brought by the International Refugee Organization charging defendant with obtaining money by means of false representations (see 36 A.B.A.J. 856, October, 1950; and 37 A.B.A.J. July, 1951, 92 F. Supp. 674). On appeal, the Court reversed on the basis of language contained in the International Organization Immunities Act, 22 USC §288a and 28 USC §1331.

The International Organization Immunities Act provides that international organizations such as the IRO shall "to the extent consistent with the instrument creating them, possess the capacity—(i) to contract; (ii) to acquire and dispose of real and personal property; (iii) *to institute legal proceedings*" (emphasis supplied by the Court). The Court found that Congress intended to give the IRO, which enters into all sorts of contracts in connection with the transportation of refugees, "the right to go into court for the protection of its rights and interests". The Court further noted that the federal courts were the logical choice since they are "the only courts whose doors Congress can open".

Another ground for jurisdiction was found in 28 USC §1331, which gives District Courts jurisdiction of civil actions arising under the "Constitution, laws or treaties of the United States". The Court stated: "Under the principles laid down in *Osborne* v. *United States Bank*, 9 Wheat. 738, this was certainly a civil action arising not only under the treaties creating the United Nations and the International Refugee Organization into both of which the United States had entered, but also under the act of Congress which gives the right to sue to public international organizations in which the United States participates." Congress curtailed the doctrine of the *Osborne* case in 28 USC §1348, which denies jurisdiction to a corporation created by Act of Congress unless the United States is owner of more than one-half of its capital stock. However, the Court ruled that that provision was not applicable since "the IRO is not a corporation created by Act of Congress, but an international organization to which the United States itself is a party".

Crimes . . . constitutional law . . . arrest without warrant . . . personal, political and civil rights . . . federal statute limiting FBI agents' power to arrest without warrant to cases when they have reasonable grounds to believe that person arrested is guilty of federal felony and might escape before warrant could be obtained applies only to felonies committed out of agent's presence . . . interception of telephone conversations between client and attorney through wire tapping device ground for new trial.

■ *Coplon* v. *U.S.*, C.A.D.C., June 1, 1951, Miller, C. J.

Disagreeing with the Court of Appeals for the Second Circuit, the instant Court upheld the power of FBI agents to arrest without a warrant for felonies committed in their presence even though there was no likelihood of escape before a warrant for arrest could be obtained. Defendant had been convicted of espionage under 18 USC §§793 and 2071 after a trial where the government introduced in evidence papers which she contended were obtained from her in the course of an illegal arrest. She sought reversal on that ground.

18 USC §3052, as that section read on the date of appellant's arrest, conferred upon FBI agents the power to arrest without warrant when they had reasonable grounds to believe that the person arrested was guilty of a federal felony and might escape before a warrant could be obtained. The Second Circuit ruled that this provision "was intended to be a constitutive, not a cumulative, grant of any powers of arrest without warrant which the agents were to have". However, the instant Court holds that the congressional intent was to give the agents power to arrest "for felonies already committed but not committed in their presence" and that such rights as existed to arrest for felonies committed in the presence of the arresting person were unimpaired. After the Second Circuit's decision had been rendered Congress amended §3052, but this, Judge Miller states, "made unmistakable what we think was true before revision: that agents have the same power which private persons have to arrest without warrant for felonies committed in their presence".

The Court then referred to *United States* v. *Di Re*, 332 U.S. 581, which held that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity". In this case, the Court notes, the applicable New York statute authorized arrests even by private persons for felonies committed in their presence. Hence the Court affirmed the conviction.

By a separate appeal defendant sought reversal of an order denying her motion for a new trial based on newly discovered evidence. Some months after defendant's trial in the District of Columbia she was tried on substantially the same evidence in the District Court for the Southern District of New York where a pretrial hearing was conducted to determine the extent of alleged wire tapping activities by the Government (see 36 A.B.A.J. 316, April, 1950; and 37 A.B.A.J. 68, January, 1951). Defendant made evidence disclosed in this hearing the basis for her motion for a new trial in the District of Columbia case. The District Court denied the motion. On appeal the Court of Appeals ruled that if it should appear that defendant was denied the right of private consultation with her attorney, defendant's constitutional rights under the Fifth and Sixth Amendments were violated and a new trial must be granted.

The Court stated: "We think the District Court erred in holding that the interception of telephone conversations between appellant and her counsel before and during her trial, if it occurred, was nothing more than a serious breach of ethics unless such interception yielded evidence which was introduced against her." The denial of the new trial was therefore reversed and the case remanded to the District Court for consideration of the question of fact.

Proctor, C. J., dissented in part, stating that the broad ruling of the majority required a new trial if "*any interception*" of conversations between defendant and her attorney occurred. He believed that on remand the controlling issue should be: "Was the defendant deprived of the full aid of counsel?" Defendant was not prejudiced, he stated, if the wrongful intrusion did not impair her right to counsel.

Husband and Wife . . . divorce . . . fact that wife sometimes ate at same table with husband does not bar her suit for divorce under statute allowing divorce for "voluntary separation from bed and board for five consecutive years without cohabitation" where they occupied separate bedrooms in same house for twenty years without cohabitation or speaking to each other.

■ *Hawkins* v. *Hawkins*, C.A.D.C., June 21, 1951, Edgerton, C. J.

The issue in this case was whether a wife could obtain a divorce "for voluntary separation from bed and board for five consecutive years without cohabitation" under D.C. Code (1940) §16-403 where husband and wife had lived in the same house but for twenty years had had no marital relations, had occupied separate bedrooms, had eaten together only occasionally without speaking to each other and had had no mutual social life. Reversing the ruling of the District Court, the Court of Appeals held that the marriage had in fact ceased to exist since the parties were voluntarily leading separate lives during the period. It stated: "Sharing a 'board' connotes eating together with some decent degree of sociability. In our opinion a husband and wife who never do that are separated from 'board', within the purpose and meaning of the statute, even though they sometimes eat at the same table."

Judge Washington dissented.

Monopolies . . . price fixing . . . minimum resale price maintenance agreements on goods manufactured and sold within state may affect interstate commerce so as to be unenforceable against non-signing retailer under ruling in *Schwegmann* case.

■ *Bulova Watch Co., Inc.* v. *S. Klein On The Square, Inc.*, N. Y. Sup. Ct., N.Y. County, June 11, 1951, McNally, J., 105 N.Y.S. (2d) 175 (Digested in 19 U.S. Law Week 2602, June 19, 1951).

In this action a manufacturer sought to enjoin defendant retailer from selling watches below the fair-trade price fixed by plaintiffs under the New York Feld-Crawford Act. Defendant had never signed a minimum resale price maintenance contract with plaintiffs and under the ruling in *Schwegmann Brothers* v. *Calvert Distillers Corp.*, decided by the Supreme Court on May 21, 1951, such agreements are not enforceable against non-signers if interstate commerce is involved and federal law is thus brought into play. Plaintiffs alleged, however, that the watches were manufactured and sold within the state, never entering the stream of interstate commerce, and that interstate commerce was not affected. Judge McNally, on an application for a preliminary injunction, rejected this argument, relied on the *Schwegmann* case and denied the motion for a temporary injunction. He reasoned as follows: "Although price fixing agreements by plaintiffs, engaged in interstate commerce, may purport to affect only resales within the State of New York, it does not follow that they do not affect interstate commerce and bring the transactions within the scope of the Sherman Act. The tendency of permitting plaintiffs to keep up the prices of their products within this state is to enable them similarly to keep up the prices of the same products in adjoining and other states. Conversely, if plaintiffs are unable to maintain the price levels fixed by them within this state, the effect may well be to lower the prices at which their products are resold in sister states."

The Court said that the most that could be said for plaintiff was that there was a serious question of fact as to the effect upon interstate commerce and that no preliminary injunction should be issued except in a case that is clear and free from doubt.

Cf., *Rothbaum* v. *R. H. Macy & Co., Inc.*, immediately following.

Monopolies . . . price fixing . . . retailer who signs fair trade agreement on products manufactured and sold within state may enforce agreement against non-signing price cutting retailer since transactions were intrastate in character and not within scope of *Schwegmann* case.

■ *Rothbaum* v. *R. H. Macy & Co., Inc.*, N. Y. Sup. Ct., Queens County, June 12, 1951, Conroy, J. (Digested in 19 U.S. Law Week 2602, June 19, 1951).

On the ground that the ruling in *Schwegmann Brothers* v. *Calvert Distillers Corp.*, decided by the Supreme Court on May 21, 1951, does not apply to intrastate transactions the Court in this case granted plaintiff retailer, who had signed a fair trade agreement, a temporary injunction restraining defendant, a competing non-signing retailer, from selling certain fair-traded products at less than their fixed price. The Court stated that since "the products in question were manufactured in New York, sold to the defendant in its stores in New York and the subject of fair trade contracts entered into in New York" the transactions were intrastate in character and therefore not within the scope of the *Schwegmann* case, whether or not "the manufacturers or distributors of the products

involved may or actually do sell like products to retailers in other states".

Cf. *Bulova Watch Co., Inc.* v. *S. Klein On The Square, Inc.*, immediately preceding.

On July 6, 1951, Justice Conroy denied a motion to hold R. H. Macy & Co., Inc. in contempt for violating the temporary injunction issued June 12, 1951. In opposition to the motion it was alleged that Macy's had purchased its stock of the fair-traded products which were the subject of the sales in question from an out-of-state jobber. The Court stated that it could not find positive evidence of a violation of the injunction.

Monopolies . . . price maintenance . . . agreement to refuse to sell to wholesaler who cuts prices legal under principle of *Colgate* case . . . Miller-Tydings Amendment superseded Wilson Tariff Act so far as to sanction resale price maintenance on imports when permitted by state statute.

■ *Adams-Mitchell Co.* v. *Cambridge Distributing Co., Ltd.*, C.A. 2d, May 31, 1951, Augustus Hand, C. J.

Plaintiff liquor wholesaler brought an action to rescind an oral contract for the purchase of imported branded whiskey. Plaintiff alleged that the exclusive distributor's agent assured him that he and one other wholesaler would be the only outlets in the area and that the going wholesale price of $54.80 a case would be maintained. However, defendant failed to remove a third wholesaler's stock on hand and the price of the whiskey dropped so far that it was almost unsalable. A verdict for plaintiff was rendered by the jury in the District Court.

On appeal the Court affirmed. It stated: "There are legitimate means of price maintenance in spite of the provisions of the Sherman Act, *e.g.*, *United States* v. *Colgate & Co.*, 250 U.S. 211. Such means include a refusal to sell in the future to those who had not maintained a suggested price. The situation in *Kiefer-Stewart Co.* v. *Seagram & Sons* [340 U.S. 211, see 37 A.B.A.J. 223; March, 1951] was different for there competitors agreed on a price to be fixed with the customers of both and fixed the price with the latter." In the present case the Court found that the agreement only suggested that if the other two distributors cut prices they would be unable to obtain further supplies. Judge Hand said: . . . "the limitation of $54.80 per case was and only could be a suggested limitation to a purchaser which was lawful under the decision of the Supreme Court in the *Colgate* case."

The Court also held that the Miller-Tydings Amendment which sanctions resale price maintenance agreements where permitted by state law was applicable. Judge Frank's dissenting argument that the Miller-Tydings Amendment did not apply because "it only amended the Sherman Act of 1890 and did not affect the anti-trust provisions of the Wilson Tariff Act of 1894, 28 Stat. 570" was rejected. The Court stated: "We do not think the Miller-Tydings Amendment should be so limited. It was an amendment to the original Sherman Act enacted some 43 years after the passage of the Wilson Tariff Act when the Sherman Act and the Tariff Act each embraced like prohibitions on restraint of foreign commerce. When the Sherman Act was amended in 1937 to exempt cases where a local State statute permitted resale price maintenance it must be deemed to have superseded the Wilson Tariff Act so far as to sanction price maintenance in cases within the purview of the State Act."

Judge Frank in his dissenting opinion said: "I think the anti-anti-trust lawyers and their clients will welcome the foregoing decision for two reasons: First, it breathes new life into the remains of the decrepit doctrine of *United States* v. *Colgate*. . . . Second, it sanctions retail price-fixing of imported products, by reading the provisions of the Miller-Tydings Act of 1937—designated by Congress as an amendment to the Sherman Act of 1890—into those sections of the Wilson Tariff Act of 1894 which outlaw contracts intended to restrain free competition in, or to raise the market price of, articles imported into the United States." He believed that in enacting the Miller-Tydings Amendment Congress intended to permit price-fixing on branded domestic goods, but not on imported goods. Furthermore, the *Colgate* doctrine, he stated, permitted only a bare refusal to sell to price-cutters and the evidence in the present case showed more than that.

Monopolies . . . price maintenance . . . state unfair cigarette sales act and cigarette tax act held unconstitutional as arbitrary and discriminatory since they deprive retailers' cooperative of rights obtainable by similarly situated corporations.

■ *Lane Distributors, Inc.* v. *Tilton, Supervisor of the Cigarette Tax Bureau, and Margetts, State Treasurer, of New Jersey*, N. J. Sup. Ct., June 19, 1951, Oliphant, J. (Digested in 19 U.S. Law Week 2614, June 26, 1951).

In this action plaintiff protested the determination of the Cigarette Tax Bureau of the Department of the Treasury denying plaintiff's application for a renewal of its wholesale dealer's cigarette license. Plaintiff was a subsidiary of a cooperative whose stockholders were small, independent druggists who had banded together for the purpose of buying cigarettes in quantity so as to be able to secure the same price benefits enjoyed by large firms and chain stores. Sales were made by plaintiff to the cooperative's stockholders at prices fixed by the Unfair Cigarette Sales Act but profits redounded to the benefit of the stockholder-purchasers. The renewal of the license was denied by the Bureau on the grounds that the stockholders received rebates, discounts and kickbacks on their purchases in violation of the Unfair Cigarette Sales Act and that plaintiff was not a wholesaler within the definition of the Cigarette Tax Act and thus was not eligible for a license thereunder. A "wholesale dealer" is defined in that Act as a person who "acquires cigarettes, at least seventy-five per centum (75%)

of which are for purposes of resale to retail dealers in this State, . . . not connected with said wholesale dealer by reason of any business connection or otherwise and who maintains an established place of business where cigarettes and related merchandise are sold . . ." Plaintiff contended, *inter alia,* that both acts were unconstitutional in that they deprived it of property without due process of law and deprived it of the equal protection of the laws.

The Court agreed with the Bureau that plaintiff did not meet the statutory definition of a "wholesale dealer", but then proceeded to consider the constitutionality of the Cigarette Tax Act and the Unfair Sales Act, which, the Court declared, were in "*pari materia*", each dependent on and related to the other. In fact, the Court points out, the renewal of plaintiff's license under the Cigarette Tax Act was denied in part because of an alleged violation of the Unfair Cigarette Sales Act.

Turning to the Cigarette Tax Act, the Court found that it was "arbitrary and discriminatory" to require a "wholesale dealer" to sell 75 per cent of its cigarettes to retailers with which it has no business connection. Since plaintiff sold all its cigarettes to the member retailers it was disqualified from securing a license as a cigarette wholesaler, and this, Justice Oliphant stated, prohibited it from "engaging in a legitimate business of [its] choice".

The classifications in the Unfair Cigarette Sales Act, similar to those in the Tax Act, were also found to be "arbitrary and discriminatory". That Act regulates the prices at which wholesalers and retailers may buy and sell cigarettes, and under its price restrictions the cooperative could not operate as a retailer and still buy and sell cigarettes at the wholesale price. The Court pointed out that under the terms of the Sales Act plaintiff was deprived of the right to sell at wholesale prices, whereas if it made 75 per cent of its sales to retailers with whom it had no corporate or business connection, or if it was a single corporation, such as a chain, or if it was a vendor operating more than thirty vending machines, it would not suffer the deprivation.

In the Cigarette Tax Act the definition of "wholesaler" was held void but a large part of the statute sustained under a severability clause. The Unfair Cigarette Sales Act, since it was one integral whole, was declared completely unconstitutional in spite of such a clause.

Public Utilities . . . transit radio music . . . radio broadcasts of "commercials" and "announcements" in public transportation vehicles deprives objecting passengers of their liberty without due process of law and infringes their constitutional right to be free from forced listening.

■ *Pollak* v. *Public Utilities Commission of the District of Columbia,* C.A.D.C., June 1, 1951, Edgerton, C. J.

Forced listening to radio broadcasts imposed on passengers in public transportation vehicles was held unconstitutional in this case by a unanimous decision. The Public Utilities Commission had found that transit radio was "not inconsistent with public convenience, comfort and safety" and the District Court had dismissed appellants' petition of appeal on the ground that "no legal right of the petitioners . . . has been invaded" (see 36 A.B.A.J. 224, March, 1950; and 37 A.B.A.J. 536, July, 1951).

The Court of Appeals, reversing, found that transit passengers were a "captive audience", forced to hear the broadcasts while riding on the street cars and busses, making it difficult to "read, talk, meditate, or relax". The Court ruled that "Transit broadcasts deprive objecting passengers of their liberty without due process of law in violation of the Fifth Amendment of the Constitution".

The constitutional guarantees of liberty are directed only against government action, but the Court found that the forced listening resulted from government action since Congress had given the transportation company not only its franchise, but a virtual monopoly on local transportation. Furthermore, by sanctioning the transit radio system the Commission had engaged in governmental action.

Judge Edgerton, writing for the Court, stated: "No occasion had arisen until now to give effect to freedom from forced listening as a constitutional right. Short of imprisonment, the only way to compel a man's attention for many minutes is to bombard him with sound that he cannot ignore in a place where he must be." He noted that transit radio was a "new phenomenon", but "the Bill of Rights . . . can keep up with anything an advertising man or an electronics engineer can think of". Judge Edgerton remarked: "Freedom of attention, which forced listening destroys, is a part of liberty essential to individuals and to society."

However, freedom from forced listening, the Court declared, is not absolute, but the exceptional circumstances in which the government may compel attention as it may forbid speech were absent here.

The Court warned that the decision applies only to "commercials" and "announcements" and said that it was "not now called upon to decide whether occasional broadcasts of music alone would infringe constitutional rights".

In further support of its position, the Court referred to *Kovacs* v. *Cooper,* 336 U.S. 77, in which a municipal ordinance prohibiting loud and raucous sound trucks in public streets was upheld. The Supreme Court in that case ruled that freedom from forced listening outweighed even the public interest in amplifying a communication protected by the First Amendment. The Court said that it would seem to follow that freedom from forced listening outweighs the private interest in amplifying a communication like advertising not protected by the First Amendment.

War . . . Trading with the Enemy Act . . . Alien Property Custodian may seize obligations "evidenced" by American

corporation's bonds held outside United States like any other enemy-alien-held chose in action . . . constitutional right under Fifth Amendment not violated since recoupment from Treasury of just compensation protects obligor if sued by bona fide holder in courts of foreign state.

■ *McGrath* v. *Cities Service Co. and Chase National Bank of the City of New York*, C.A. 2d, June 13, 1951, Learned Hand, C. J.

Reversing the judgment of the United States District Court for the Southern District of New York (see 37 A.B.A.J. 67; January, 1951, 93 F. Supp. 408), the Court of Appeals for the Second Circuit ruled that under the Trading with the Enemy Act the Alien Property Custodian may seize as enemy alien property debts represented by negotiable bearer bonds issued by an American corporation but held outside the United States. Defendant argued and the lower court held that the Act was limited to property within the United States and that a bond, which was not in this country, was the debt itself and not merely evidence of the obligation. Defendants also objected that their property would be taken without just compensation in violation of the Fifth Amendment since they would be subject to suits in foreign courts by bona fide holders of the bonds.

Rejecting defendants' contentions, the Court noted that the intent of the Act was to allow seizure of all debts and choses in action, including bonds. Emphasis was also placed on the history of the English law which developed the idea that the obligee could invoke legal sanctions against the obligor even without possession of the document evidencing the debt.

Turning to the constitutional question, Judge Hand held that the obligor, if compelled to pay the Alien Property Custodian, was entitled to recoupment from the Treasury if later sued by a bona fide holder of the bonds in the courts of a foreign state. The Court stated that the decision in *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, controls the present case so that a contract to pay "just compensation" for the "taking" would be "implied" in favor of defendants to protect them against any subsequent recovery by a bona fide holder.

Further Proceedings in Cases Reported in This Division.

■ The following action has been taken by the United States Court of Appeals for the Second Circuit (see review *supra*):

REVERSED, June 13, 1951: *McGrath* v. *Cities Service Co. and Chase National Bank of the City of New York* —War (37 A.B.A.J. 67; January, 1951).

Make Your Hotel Reservations Now!
1951 Annual Meeting

New York City, September 17-21, 1951 — Headquarters Hotel — Waldorf-Astoria

The Seventy-Fourth Annual Meeting of the American Bar Association will be held in New York City, September 17 to 21, 1951. Further information with respect to the schedule of meetings will be published in forthcoming issues of the *Journal*.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois, and should be accompanied by payment of $5.00 registration fee for each member of the Association for whom reservation is requested. Be sure to indicate three choices of hotels, and give us your definite date of arrival, as well as probable departure date. (Regret all space at Headquarters Hotel exhausted.)

More detailed announcement with respect to the making of hotel reservations for members of the Association may be found on the inside front cover of the April issue of the *Journal*.

All unassigned space will be released to the respective New York Hotels, by the Association, on August 27, 1951, after which date reservations may be made, by individual members, with hotels directly.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Kentucky Law Schools Give Practical Training

■ In the March JOURNAL, A. S. Cutler, of the New York Bar, contributes a discourse on "Inadequate Law School Training", and argues for giving law students better training. He complains the law schools "refuse in most parts to acquaint their students with the practical work of the law".

This article by Mr. Cutler struck me forcibly, first, because he appeared quite unaware of the latest development in this field, and second, that the Editors of our JOURNAL, by printing the discussion, showed they were not fully informed either.

The first sentence is enough to attract attention. Mr. Cutler said: "Our law schools do virtually nothing to acquaint their students with practical work of the law". It clearly appears the JOURNAL, through Mr. Cutler, indicts law schools on two counts, that they *do nothing*, and they *refuse to do anything* on practical lines to train lawyers.

This is error, we believe. The two accredited law schools in Kentucky, University of Louisville, and the College of Law of the University of Kentucky, particularly the latter, have done a marvelous job in this field. Here is Dean Elvis J. Stahr's brief statement of a new plan that is really working:

> In the summer of 1950 for the first time in the history of the state an organized program of "apprenticeship" training for law students was devised and put into practice in cooperation with the Kentucky State Bar Association. The program was on an experimental basis, and sixty law students, nearly fifty of whom were from University of Kentucky, participated. The program is probably unique in the United States.
>
> All law students who were interested and able to participate applied for summer training of from three to six or more weeks, specifying the city or town, in which they desired to work, and the lawyer or law firm, with which they would like to work. A committee appointed by President Marcus C. Redwine, of the State Bar Association, then reviewed the applications and wrote to the lawyers whom the students had named, after approving the lawyer in each case, asking for their cooperation. The response was practically 100%, the attorneys showing a fine interest in helping law students who wished to get practical experience in the law office and the courts.
>
> As a result, law students were placed in law offices in every section of the Commonwealth. At the end of the apprenticeship period the students returned to their respective law schools and wrote reports on their experiences with the program. In addition the lawyers made reports, giving their reactions to the program. Not a single unfavorable reaction was received from any student or from any lawyer. On the contrary, both the student and the lawyer were highly enthusiastic in every case. It is planned to continue and expand the program in the summer of 1951.

In the February, 1950, *Journal of the American Judicature Society*, Edward L. Bryant, of Detroit, made a convincing plea to help young lawyers after they pass the bar examination to get interneships. That was refreshing and helpful. Young lawyers won't need this after graduating, if they could have training for two or three summers in busy law offices before they graduate.

We suggest the brilliant editors of the AMERICAN BAR ASSOCIATION JOURNAL take a day off and catch up on the latest in law student training. Editor Glenn R. Winters knows of our program and last fall asked for a descriptive discourse, but we prefer that someone else write it, and then Kentucky won't be "accused" of boasting, quite so much, at least.

MARCUS C. REDWINE
Winchester, Kentucky

Disagrees with Mr. Wiener

■ The paradox of the fight against subversive activity is that many of its leaders first seek to attack the very idea of liberty which many of us believe is the foundation stone of true Americanism.

Your leading article in the March issue by F. B. Wiener is symptomatic of the frustrated urge to protect America by redefining its freedom.

No man can tell with absolute certainty today what the Founding Fathers intended the First Amendment to mean. The balance of probability, however, weighs strongly for the Jeffersonian view which Franklin supported and which traces through Locke to Milton. It would be strange if Jefferson and Madison would have tried to advocate anything else, and it would be stranger still if the First Congress would adopt Madison's language if they did not approve his idea. It is also clear that none of the Framers ever proposed a law making belief in revolution, or its advocacy, a crime in itself. That new twist was left for modern sophists.

Miltonian liberty was based on the concept that only a free mind can choose the truth as contradistinguished from error. A man who is not free to examine the viewpoint of those in error, cannot be sure that his own view is correct. There can be no standard of orthodoxy in political beliefs which is dictated by the Government. We are as free to choose our political beliefs as we are to choose our religion. The people tell the Government what to think, but the majority cannot tell

the minority what to think, or say, or teach, or advocate.

The framers defined treason in very limited terminology. Can anyone believe that they intended to leave Congress free to define "second-degree" treason in more comprehensive terms and bring back all the evils of the British statutes in the garb of "subversive activity"?

It will take more arguments than Mr. Wiener's or Mr. Justice Learned Hand's to overcome the tradition of which Holmes was the chief modern advocate.

And our system of government—including freedom for the thought we hate—will survive in the free market of ideas long after the frantic search for constitutional justification for control of subversive ideas by such men as Wiener and Hand has taken a minor place in the history books.

Our Government is strong in organization and in the spirit of the people. Those who believe that ideas, words, teachings, discussions, or even conspiracies and espionage can destroy us are scared of bogeymen. *Only armed men can overthrow us.* They must either come from without our borders or rise up amongst us. I, for one, believe that we can better trust the police and the F.B.I. to find the guns which are going to be used by the revolutionists than we can trust them to judge when an idea or speech of "revolution" has reached the point where good government must interfere.

A fifth column within the fabric of the Government—men like Chambers and his "leaks"—must be controlled and punished. That requires lots of trained detectives, but it won't be helped by silly laws like test oaths nor by antiliberty arguments such as Mr. Wiener has wasted his time in constructing.

It is time for the American Bar to take sides. Let it be for true Americanism and not for a diluted variety invented by frantic and hysterical men who dare to compare us with Czechoslovakia and the Weimar Republic! For shame!

PATRICK H. FORD
Los Angeles, California

Where Will *Williams'* Doctrine End?

■ There is one phase of the migratory divorce problem to which little consideration has been given in the recent articles in your JOURNAL. This phase is well illustrated in the *Williams* cases. Mrs. Williams was never in the State of Nevada; therefore, whatever acts of hers were relied upon as the grounds for the Nevada divorce, must have been committed by her in North Carolina ("Williams was married to Carrie Wyke in 1916 in North Carolina and lived with her there until May, 1940", 317 U. S. 289). If those acts, when committed, were not contrary to the marital standards of North Carolina, how do they later become grounds for divorce in Nevada?

Suppose in Illinois drinking liquor in moderation is not grounds for divorce, but some other state, a prohibition state, has a statute that drinking intoxicating liquor, even in moderation, is grounds for a divorce. Under the *Williams* case, a Chicago husband, for example, could go into the prohibition state and divorce his wife because she had taken an occasional drink in Chicago, where it was perfectly all right to do so. The second state attaches a legal consequence to an act done in another state which did not apply to the act when and where committed and can thus regulate the conventions of the other state. Where is this going to end?

I suggest this is an interesting problem for some of your readers to discuss.

ALBERT L. VOGL
Denver, Colorado

On Lawyers Called to Military Duty

■ Certainly every lawyer, young or a bit older, who is subject to call for military service, as a Reservist or by induction, and who has a private law practice, wonders how he can leave and yet retain his law practice for one, two, three or more years.

In the April, 1951, issue of the JOURNAL, Paul W. Lashly suggests some ways it can be done.

Would it not be better to face up to the grim reality that no lawyer can keep his clients or practice if he is away for a span of years? Folks just lose the habit of coming to you, and your name on an office window or on legal papers graciously stating you are "of counsel" won't help.

The writer is one who enlisted, left a good law practice (one-man office) in 1942 realizing that he would have to start from "scratch". The office was closed almost three and one-half years, and when reopened, very quiet indeed. Sure, there were some old clients who soon found their way back to the office, but many never came back. I was even fined $9.40 by good old Uncle Sam for failing to deduct social security tax for my secretary. Just plum forgot it!

All the above is not meant to discourage anyone. On the contrary, facing up to truth is better in the long pull.

Want the rest of my story? Well, here it is. My practice improved just about every month. My war record, though ordinary, seemed to impress some people and there seemed a sort of prestige never felt before. I knew the road was tough, worked hard, gave prompt service. Tried to make each client feel that he or she was my only client. Within one year the practice was as good as when I left three and one-half years before—many new clients; and each year since has been better than the year before.

As a Reservist I'll be called again, maybe; and again the practice will be gone, probably.

But new experiences have a way of preparing each of us for greater success. And so endeth my story....

LAURENCE C. GRAM
West Allis, Wisconsin

Wants Rescission of Communist-Oath Stand

■ I was deeply disappointed when the

House of Delegates of the Association voted against reconsideration of the communist-oath resolution adopted by the House of Delegates at their meeting in September, 1950. A Chicago newspaper said that the motion to reconsider was defeated by a "thunderous vote". The resolution, itself, was adopted on September 22, 1950, without debate.

Twenty-six lawyers of distinguished attainments and ability had asked for reconsideration. Among them were past presidents of the American, New York City and Chicago Bar Associations and an ex-Justice of the United States Supreme Court.

The fight to rescind this vicious resolution should never end until the rescission is accomplished. It proposes to base present membership in the Bar not on present conduct, but conduct however remote in time. If any former Confederate soldier or a member of the Confederate Congress or of the Confederate state legislature is still a member of the Bar, he would be subject to disbarment under this resolution.

If a young man at 18 years of age joined some organization later found to be a communist front, he would have to list the membership in his affidavit until his death. Yet, he might have had no knowledge of the actual purposes of the organization, operated by the devilishly secret methods of the communists.

The American Bar Association would do well to follow the example of the Third District Court of Appeal of California which on April 6 held that the regents of the University of California violated the state constitution in requiring a special oath of faculty members. It held that the oath provided in the state constitution was all that could be required.

The resolution of last September must be expunged. It will be when the present hysteria has passed, an hysteria which has caused many acts of brutal injustice. I weigh my words when I say that thirty years from now we shall not be proud of many of our punitive actions in 1950 and 1951.

In time of tension and excitement, lawyers should stand sternly for fair play and precious personal rights. It is a matter of great pride for American lawyers that John Adams, when a young lawyer in Boston, acted as attorney for the British captain and soldiers charged with murder on account of the people killed in the Boston Massacre of 1770.

EDWARD R. LEWIS

Chicago, Illinois

Praises Article on the Manifesto

■ I have just finished reading Mr. Crotty's article in the June issue of the JOURNAL concerning the Communist Manifesto. The article is one of the best that I have seen on this subject and should not only be read by all but remembered by all.

The thought occurs to me that with a very slight revision to eliminate its particular application to lawyers, the article should be given general publication in some magazine of the widest possible circulation. It is the kind of article that every voting man and woman in this country should read, think about and act on.

ROBERT W. FULWIDER

Los Angeles, California

Freedom of Thought—Answer to Mr. Wiener

■ I have waited in vain for the publication of an answer to Frederick Wiener's article, "Freedom for the Thought That We Hate", published in the March, 1951, issue of the JOURNAL, page 177. Instead you have printed two letters in commendation—Henry Coil's proposal to enshrine "guilt by association" as a constitutional principle, and Herbert Feibelman's letter characterizing the demand for the protection of minority rights as "a harmful upsurge".

Lest these be taken as representative of the entire legal profession, I hasten to submit the following comments on Mr Wiener's basic assertions:

1. *Assertion:* The issue is "whether there is anything in the Constitution that guarantees immunity . . . for those who seek to replace" our representative form of government with some totalitarian form.

Comment: No such guarantee is claimed. Freedom of thought guarantees only an equal hearing for all shades of political and economic philosophy. Free discussion of ideas produces an intelligent electorate which will always reject totalitarianism. If repressed, intellect atrophies, and a people becomes ripe for dictatorship, self-imposed or othewise.

2. *Assertion:* The *Schneiderman* decision laid down a rule of constitutional law.

Comment: The *Schneiderman* case decided solely an issue of *statutory* interpretation. The decision may be questionable, but its validity is *not* the criterion on which stands or falls the constitutional doctrine of freedom of thought.

3. *Assertion:* Article IV of the Constitution, providing that "The United States shall guarantee to every state in this Union a Republican Form of Government" refutes the idea of freedom of thought by forbidding the idea of monarchy.

Comment: Nothing in Article IV prohibits a citizen's discussing, even advocating, monarchy or prevents amendment of the Constitution so as to allow an anti-republican form of government in a state, if its citizens foolishly so desired. In the words of Judge Hand, the First Amendment "protects all utterances, individual or concerted, seeking constitutional changes, however revolutionary, by the processes which the Constitution provides". *U. S.* v. *Dennis,* 183 F. (2d) 201, 206. Such talk is illegal only when it leads to a threat of force or violence.

4. *Assertion:* Historically, freedom of thought is political suicide.

Comment: The basic causes of the fall of the Weimar Republic and the Communist seizure of power in Czechoslovakia are grossly misrepresented. During the twenties and early thirties, Nazi Party members were allowed to march through the streets and even the legislative chambers in full uniform, dispersing opposition political meetings with armed goon squads and terrorizing the electorate

with the fist and the rubber hose. The Weimar Republic may have committed suicide, but by allowing the antidemocratic elements in Germany a free hand to engage in open defiance of law and order. It is absurd to imply that such activities are protected by freedom of thought. "Error of opinion may be tolerated where reason is left free to combat it", but reason is free to combat error only so long as the political climate leaves the electorate free to make an open choice of honestly presented alternatives—a climate free of public demonstrations of force or private exercise of violence.

The unfortunate development in Czechoslovakia was aided immeasurably by the convictions of Czech democratic leaders that they must cooperate with the communists to survive at all, in view of the Teheran Conference decision placing Czechoslovakia within the Sovict sphere. This policy of "getting along with Stalin" by giving the Czech communists everything wanted in the way of public office and totalitarian policies was suicide, but was in no way attributable to overindulgence in freedom of thought.

The fight to preserve freedom of thought and discussion must be waged by each generation anew. Yet few have improved on words written 100 years ago. "The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."

—John Stuart Mill, *On Liberty*.

W. Perry Norberg
Burlingame, California

House of Lords To Hear Libel Case

■ I am asked by Lord Kemsley to write and say that his attention has been drawn to the account which appeared in a recent issue of the American Bar Association Journal of his libel action against Mr. Michael Foot and others [see 37 A.B.A.J. 332; May, 1951].

So that the record may be clear, he feels that an addendum should be published to the effect that he has been granted leave to appeal to the House of Lords and that this hearing is now pending. The whole case is therefore still *sub judice*.

Frank Oliver
Manager, Kemsley Newspapers, Ltd.
in New York

Would Uphold Dean Storey

■ In the May issue of the Journal is an article by Warren Freedman wherein he sets forth what he terms a reply to an article by Dean Robert G. Storey.

As I do not see any basis for sympathy to the underlying thoughts of Mr. Freedman, it appears to me that you should obtain an authoritative author to correctly present the status of the legal profession and socialization. I am of the opinion that Dean Storey has done very nicely and has tried to present the correct issue, and therefore wish to impress on you that he should be upheld and such ideas as Mr. Freedman presents should be thrown out the window; they certainly do not show any experienced consideration . . . .

Arthur Lund
Tipton, Iowa

Constitutional Law for the World

■ Judge Robert N. Wilkin's article on "What Are We Fighting For? The Need for Juridical Order", in the January and February, 1951, issues of the American Bar Association Journal, is currently one of the foremost contributions in behalf of world peace.

But we should like to suggest an amendment. And that is, instead of "juridical order", we talk of "world constitutional law and order". Judge Wilkin himself points out (page 1) that the "fundamental difference between the contending parties in each instance is found to be a difference in their conceptions of law". We may be fighting for order, but our opponents make the same claim in their behalf. Accordingly, and with due deference to Judge Wilkin's fine delineation, what may be looked upon as "juridical order" by us may not so be viewed by those who oppose us. In other words, it is not so much that we are fighting for "juridical order" and our opponents not, as that we and they don't agree as to what constitutes such order. We, in the western democracies, cannot consent to definitions and attitudes that not only do not comport with our concepts, but actually seem to flout them. Maintenance of our point of view by peace through victory is of course the most proved method. But, if, along the lines of Judge Wilkin's attempt and that of other statesmen, philosophers and jurists, we could preferably find a satisfactory solution without recourse to arms, then insisting on our definition of "juridical order" for universal acceptance should not become necessary at this stage.

Judge Wilkin, himself, suggests, in proposing his concept, that it does not encompass changing any system of society. But we are afraid that in fact it does, in his definition of "juridical order", for when he talks of "the regulation of political affairs and the settlement of disputes by rule of law", and contradistinguishes it from anarchy, despotism and totalitarianism, he is not reckoning with how those other governments might label ours. We firmly believe that we really conduct our affairs by rule of law, but if we are not going to impose it on others who will not have it, in finding a common meeting ground, then let us introduce something we can all accept, and that will not do violence to our individual systems of society and jurisprudence.

"World constitutional law and order" is a concept, we believe, that could be incorporated within the framework of the "juridical order" of every nation and nationality. This,

(Continued on page 626)

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ The following account of the preparation of the proposed Wisconsin Criminal Code will be of interest because of the growing concern of lawyers and citizens generally with the defects and anachronisms of substantive criminal law. It is hoped that the publication of Mr. Sachse's statement will stimulate an exchange of information among those who are attempting to deal with this most difficult and important problem.

Proposed Wisconsin Criminal Code

By Earl Sachse, Executive Secretary, Wisconsin Legislative Council.

■ The Wisconsin legislative council introduced the first part of a proposed new criminal code in the 1951 legislature.[1] The bill covered three chapters of the code, as follows:

Chapter 339—General Provisions

Chapter 340—Crimes Against Life and Bodily Security

Chapter 343—Crimes Against Property

The remainder of the code will contain six additional chapters. The entire code will be presented as a single bill in the 1953 legislative session.

The research work on the bill was started in October, 1949, under the auspices of the council's judiciary committee. The committee concluded at an early date that a cursory study would be of little value, and it was therefore decided that the substantive criminal law should be thoroughly revised and codified. Legislative interest in this subject goes back to the 1945 legislative session, during which a resolution calling for revision of the criminal law was adopted.[2]

The substantive criminal law of Wisconsin is in great need of revision. Most of the present sections were enacted in 1849[3] and at that time were merely copied from the statutes of other states. Most of them remain in their original form today, phrased in nineteenth century language and aimed at problems which in many cases have ceased to exist. New sections have been added in piece-meal fashion without regard to sections already enacted. The result is repetition and inconsistency.

The project was carried out by a technical staff under the direction of a subcommittee of the council's judiciary committee. The staff consisted of seven[4]—five advisory members and two full-time research associates, the latter being outstanding law graduates who had been granted fellowships by the University of Wisconsin Law School. At the outset this group, with the advice of the subcommittee, outlined the method of procedure and the form in which the material was to be presented.

The research associates devoted the first two months to a thorough study of the criminal law generally. Following this, attention was directed toward the preparation of the new chapter on crimes against property. The research associates first carefully read all the material on a particular phase of this subject and then prepared a preliminary draft of the proposed section, together with an analytical comment. These drafts were presented at weekly meetings of the entire technical staff, where they were thoroughly reviewed and analyzed. When changes were suggested, the material was rewritten and presented again at a future meeting of the staff.

A great deal of care and attention were given to the language used in the sections, as well as the material in the comment. The terminology used in the code differs substantially from the present law and was chosen with great care. The Restatement of Torts was heavily relied on in a number of the definitions and in such areas as the crimes involving negligence. Where a new section covered several crimes in the present law, a new term was chosen which would be descriptive of the offense and yet free from confusion with the old law. For example, "stealing" under the new code covers the old offenses of larceny, embezzlement, obtaining by false pretenses and confidence game.

No draft of either a section or a comment was approved by the technical staff for submission to the subcommittee until the entire staff was in accord with both the language and the form. After review by the judiciary committee, the completed chapters were submitted to the legislative council for approval. Following the completion of the three full chapters the entire project was again reviewed and arranged in final form for the report.

It was recognized from the outset that no matter how disorganized, repetitious or obsolete the present criminal statutes appeared, they all were drafted and passed to meet specific needs, and that consequently care should be taken to see either that the need no longer exists or that it is taken care of in the new code. With this in mind, the legislative history of all the old sections was carefully examined as well as the cases which had arisen under those sections. In addition, in relation to each specific crime covered, most of the treatises, law review articles and annotations were studied.

The first-degree murder section provides a good illustration of how the case law was helpful. The old

1. Bill No. 784, S., Volume VII, 1950 final report legislative council (April, 1951).

2. Jt. Res. 75, S. (1945).

3. The first session of the legislative after Wisconsin became a state.

4. Advisory Members: William A. Platz, Assistant Attorney General, State of Wisconsin; John E. Conway, Revisor of Statutes, State of Wisconsin; George H. Young, Professor of Criminal Law, University of Wisconsin; Frank J. Remington, Professor of Criminal Law, University of Wisconsin; Earl Sachse, Executive Secretary, Legislative Council. Research Associates: Marygold Shire Melli Orrin L. Helstad.

section requires a "premeditated design to effect death". The cases, however, revealed that this phrase has been construed to mean simply "intentional causing of death", thus making it clear that the old phrase ought to be abandoned.

The criminal statutes of other states were examined for new ideas in organization as well as substance. As far as the American states are concerned, this venture with one exception proved to be generally unprofitable. The exception is Louisiana. That state had a thorough-going revision of its criminal statutes in 1942, and we are indebted to the Louisiana code for many of our ideas on form, organization, and substance.[5]

The foreign codes that were available also proved very helpful. The Italian, Swiss and German codes, plus the two great works of nineteenth century English codification as represented by the Indian and Canadian codes, were valuable. While these codes often reach the same result in practice as the common law, they do so much more directly. They represent the best work of some of the leading criminal law scholars of the day.

The bill as presented to the Wisconsin legislature contained 108 pages. Each proposed new section was set forth in the usual bill form. This was followed by an extended comment divided into four parts. The first part covered the scope of the new section and contained an analysis pointing out the changes made and the reasons therefore and indicating the area of conduct covered by the section. The second part was headed "sections covered" and contained a discussion of the old statutes replaced by the proposed new section. Where it was considered helpful the historical background of those statutes was also included. The third part of the comment was devoted to a review of the analogous legislation, if any, in other jurisdictions. Finally, the fourth part contained a list of the more important references as an aid to those who might wish to do further research in the field.

The proposed code is primarily a modernization of the existing law. It reorganizes and redefines present concepts, but does not suggest any drastic changes in the basic penal policy of the state. For example, although minimum penalties are dropped, it is considered that this will result in no substantial change in the disposition of cases. The availability of probation, parole and conditional release[6] make it possible for courts and administrative agencies to place the emphasis on the actor and adjust sentences to fit each particular case, and this is in accord with modern penal practice. This concept made it possible to consolidate a number of old offenses under one new section.

Chapter 339 on general provisions contains the definitions of terms used consistently throughout the code. This chapter also defines the elements of a crime, the parties to crime, the inchoate crimes (such as solicitation, conspiracy and attempt), the defenses to criminal liability and provisions relating to prosecutions and penalties. Many problems, like that of the intent necessary for a particular crime, which have caused much difficulty in the criminal law, are solved by the definition of the term "intent" and a consistent use of that term throughout the code. Much of this law can presently be found only in the cases. Codifying these common law principles and setting them forth clearly in the statute, although a departure from the present system, was accomplished without making any major changes.

It should also be emphasized that while concepts have been redefined and occasionally changed, a conscientious effort was made to protect the rights of both the defendant and the state. Technical points which make it difficult to bring to justice a person who has committed a crime have been eliminated. Elimination of the fine lines of distinction between the crimes of larceny, embezzlement, obtaining by false pretenses and confidence game, by consolidating those crimes into one stealing section is an example. On the other hand, the defendant's rights have been extended in numerous cases where it was theoretically sound and practically possible to do so. For example, the protection of the double jeopardy rule was extended and the defendant was given a defense under some sections which now impose strict liability.

The revision should have a number of desirable results. The most noticeable of these will be the saving of space in the statute book. Because the revised criminal code has fewer sections than the old one, it will be much shorter. For example, Chapter 343 on crimes against property, which formerly had about 150 sections, now has twenty-two. This decrease in the number of sections is due primarily to the fact that (1) obsolete sections have been eliminated; and (2) the crimes are now defined in terms which deal with areas of conduct instead of the particular property involved or the specific means employed. Therefore, one section in the proposed code frequently covers a number of old sections. The section on damage to property of another covers about twelve old sections, which described the kind of property that could be damaged; the one on stealing replaces about twenty-six old sections which dealt with different means by which the property could be misappropriated.

Moreover, the fact that the revision is in the form of a systematic statement of the law eliminates such things as the numerous references in the old sections to persons who aid, abet, solicit and conspire to commit a particular crime. These general concepts, which apply to all sections of the code, are defined in Chapter 339 and it is unnecessary to repeat them in each section.

Not only are there fewer sections but also these sections are, in general,

5. Since the Wisconsin project was undertaken, Colorado and Missouri have appointed legislative and bar committees to study the criminal laws of those states. The American Law Institute has received a grant from the Rockefeller Foundation to make an exploratory study for a model criminal code.

6. Newly enacted as Chapter 256, Laws of 1951.

much more briefly stated. This is the result of drafting the sections in simple and concise English instead of retaining the formalistic style and lengthy enumerations of the old statutes.

The revision also should make it easier to find the law. Because the revision is a code, *i.e.*, a systematic statement of the law, it will be possible to ascertain the elements of a particular crime by reading the statute defining that crime—something that could not be done under the old statutes. For example, the old statutes prescribed a penalty for anyone who committed common law conspiracy; but one had to read numerous cases to determine what constituted "common law conspiracy". In contrast to this the proposed section on conspiracy states exactly what type of conduct is prohibited.

The systematic organization of the sections also should facilitate the finding of the law. Under the old statutes, it frequently was difficult to determine where a particular type of crime would be found. A section on giving false fire alarms could be found in the chapter on crimes against morality; one on the use of loud speakers in the chapter on crimes against persons. Much thought and careful planning went into the organization of the chapters of the proposed code. The organization is based on a classification of the crimes according to the social interest protected by each section. Each chapter contains only sections that are related to the social interests or interests protected by that chapter. Within each chapter the sections also are organized logically and subheads are used for each group of sections. For example, Chapter 343 on crimes against property is subdivided into sections on damage, trespass and misappropriation.

The proposed code should bring about greater certainty in the law and clearer analysis of the difficult cases. The sections have been drafted carefully to be sure they cover only the desired area of conduct. Some of the crimes in the old statutes were defined so broadly that they obviously covered much more than the legislature intended they should. For example, the section on kidnaping was phrased in such broad language that it covered much conduct already covered by other sections and some conduct which no one would consider kidnaping. The proposed section defines the crime very carefully to be sure it covers only conduct which is actually considered kidnaping.

The Wisconsin legislative council would greatly appreciate comments and suggestions relative to the proposed code from authorities in the field of criminal law.

Lincoln on Equality

■ I think the authors of that notable instrument [the Declaration of Independence] intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness in what respects they did consider all men created equal—equal with "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this they meant. They did not mean to assert the obvious untruth that all were then actually enjoying that equality, nor yet that they were about to confer it immediately upon them. In fact, they had no power to confer such a boon. They meant simply to declare the right, so that enforcement of it might follow as fast as circumstances should permit.

They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people of all colors everywhere. The assertion that "all men are created equal" was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration not for that, but for future use. Its authors meant it to be—as, thank God, it is now proving itself—a stumbling-block to all those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such should reappear in this fair land and commence their vocation, they should find left for them at least one hard nut to crack."

— Lincoln's Springfield Speech, June 26, 1857,
reprinted in Nicolay and Hay, *Complete Works of Abraham Lincoln* (New York: Tandy Company, 1894) Volume II, pages 330-31.

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

The Geneva Conventions for the Protection of War Victims

■ The protection of victims of war is a grave international problem which it is obviously difficult to solve. Some would say it is impossible in an era of total war and they may be right. Yet perhaps many such people speak without full appreciation of a long history of international legislation on the subject—legislation of which the most recent chapter has just been written. For nearly ninety years a series of multilateral conventions of ever-widening scope have been concerned with the problem and they cannot be called unsuccessful. If at times they have plainly been violated, infractions have been the exception, not the rule. The so-called "Geneva conventions" have done much to establish generally respected rules of conduct regarding wounded, sick and captive military personnel in time of war.

Of necessity any attempt to alleviate the hardships of modern warfare must leave much to be desired. Yet under the agreements entered into prior to 1939, much was done during World War II to ensure the humane treatment of protected persons. The war also disclosed shortcomings in the agreements, arising from new and different conditions of warfare, and immediately after its conclusion efforts were instituted to revise and improve these instruments.

Four years of postwar study and discussion, largely under the aegis of the International Committee of the Red Cross, culminated in a Diplomatic Conference which met at Geneva in the summer of 1949. Delegates from fifty-nine governments were present, including the Soviet Union and its satellites, Israel and several Arab states, Nationalist China, Iran, Yugoslavia and the Holy See. Observers from four or five other governments and from twenty-three international organizations also attended.

The Conference drew up four conventions for the protection of war victims. When the period for signature closed on February 12, 1950, sixty-one states had signed the conventions. Up to April, 1951, eight states had also deposited ratifications —a number sufficient to bring the conventions into force as among themselves. On April 26, 1951, the four conventions were transmitted by President Truman to the Senate for its advice and consent to ratification; at the time of writing, they are still pending. An accompanying report from the Secretary of State urged favorable consideration, asserting that the conventions represented a considerable advance over earlier agreements on the subject.

The four conventions, all dated August 12, 1949, are as follows:

(1) Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (revising the Geneva Convention on that subject of July 27, 1929);

(2) Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea (revising the Tenth Hague Convention on that subject of October 18, 1907);

(3) Convention relative to the treatment of prisoners of war (revising the Geneva Convention on that subject of July 27, 1929);

(4) Convention relative to the protection of civilian persons in time of war (a new subject).

The four conventions, which are designed to form as a whole a consistent body of rules for the protection of war victims, are far too elaborate to be analyzed in detail here. Yet without going into the many provisions carried over from earlier instruments, it may be of interest to note some of the innovations introduced to cope with changing conditions of warfare.

One innovation common to all four is the grouping together at the beginning of each instrument certain general provisions which are substantially identical in each. These declare, *inter alia*, that the parties will respect and ensure respect for the conventions in all circumstances; that the conventions will apply to all cases of armed conflict, even if a state of war has not been recognized by a party involved; that protected persons may not waive their rights under the conventions; and that the application of the conventions will be placed under the scrutiny of neutral "protecting powers" or of impartial international bodies, such as the International Committee of the Red Cross. Provision is also made, for the first time, for the application of certain minimum humanitarian standards to armed conflicts not of an international character, such as civil wars.

Each convention also contains provisions relating to its execution and to the repression of abuses and infractions. These provisions, though not so adequate as some might wish, are nonetheless much more elaborate than those of earlier Geneva conventions. Each party undertakes to impose effective penal sanctions against persons committing "grave breaches" of the conventions. "Grave breaches" are defined to include the willful killing, torture or inhuman treatment of protected persons, including biological experiments; and the wantonly extensive destruction or appropriation of protected property. In addition, each party is bound to ensure through its commanders in chief the execution of the conventions, to disseminate the texts as widely as possible and to accept liability for breaches.

The first convention, on the wounded and sick of armed forces in the field, is the direct successor of the original Geneva Convention of

1864: The ten articles of 1864, which grew to thirty-nine in 1929, became sixty-four in 1949. The increase reflects the effort to bring within the purview of the convention many of the novel and tragic situations that arose in World War II. Broader scope and more detailed definition are characteristic of the revised instrument.

By its terms the party in whose power wounded or sick personnel may be obligated as before to care for them humanely, and now, in addition, to do so without adverse distinction based on race, sex, nationality, religion or like criteria. The protection of the convention is extended for the first time not only to members of regular forces and persons officially attached thereto, such as war correspondents; it also covers members of resistance movements so long as they are responsibly organized, carry arms openly and operate according to the laws and customs of war. The same protection is further afforded to other new groups, such as regular troops of an authority not recognized by the detaining power; merchant mariners and civil air crews; militiamen and volunteers; and inhabitants of an invaded territory who spontaneously take up arms without formal organization. A further provision, obviously based on World War II episodes involving parachutists and resistance fighters, establishes the rule that no one shall be molested or convicted for having nursed the wounded or sick.

An important new article introduces for the first time the concept of "hospital zones"—areas or localities established solely for the care of the sick and wounded and entitled to immunity from attack. Such zones, as indicated in a model agreement on the subject attached to the convention, are to be of limited extent compared to the area of the country, distant from military objectives, undefended and used exclusively for humanitarian purposes. Since the convention itself is only permissive with respect to the establishment of such zones, the effective adoption of the concept will depend on the acceptance given to the specific terms of the model agreement. Concerning this only time can tell.

The second convention of 1949, dealing with the wounded and sick of armed forces at sea, contains provisions substantially similar to those of the first convention. It is noteworthy that this convention is the first revision in the applicable rules since the Tenth Hague Convention of 1907 adapted to maritime warfare the rules of the Geneva Convention of 1906. The new instrument, like the land warfare convention, brings within its protection merchant mariners and civil air crews, as well as members of regular forces, militia and organized resistance movements.

As with the conventions already discussed, the 1949 convention on prisoners of war is broader in scope than its predecessor of 1929 and more detailed in its rules. Like those conventions, its protection has been extended for the first time to cover members of irregular and resistance units. And in the light of World War II experience, much greater precision has been given to rules governing such matters as improper treatment of prisoners, permissible types of labor and punishments, conditions for transfers and relations with prison authorities. A prisoner's safeguards in judicial proceedings against him for an alleged offense are spelled out in greater detail than formerly: They include the assistance of counsel, the attendance of witnesses and protection against double jeopardy and *ex post facto* legislation. Some improvement has also been made in arrangements for prompt transmission of data regarding prisoners to a central agency and to prisoners' own governments and families.

Two innovations in particular are worthy of mention. The first does away with the standard of the 1929 convention that prisoners should receive rations equivalent in quantity and quality to those issued to the troops of the detaining power. The 1949 convention provides instead that rations must be adequate in quantity, quality and variety to ensure good health and prevent loss of weight or nutritional deficiencies; in this connection account is to be taken of the habitual diet of the prisoners.

The second innovation concerns the financial allowances to be made to prisoners. Under the 1929 convention, all officers but not all men were entitled to pay; pay depended on the type of employment and varied with rank and job. This complex and unsatisfactory system is done away with in the 1949 convention. Advances of pay are now to be credited to all prisoners in local currency equivalent to a specified amount of Swiss francs: this amount varies from eight francs per month for personnel ranking below sergeant to seventy-five francs per month for general officers. In addition, each working prisoner is entitled to working pay at a rate to be fixed by the detaining authorities, but which is to be not less than one-quarter Swiss franc per day. The authorities may determine how much cash a prisoner may receive; further sums due him are to be held to his credit in a personal account. The ultimate settlement of such accounts upon the termination of captivity is elaborately provided for.

No Geneva convention dealing with the protection of civilian persons in time of war was ever formally drawn up until 1949, although drafts and *projets* had been under discussion since the end of World War I. There was in consequence no conventional protection for civilians in either World War beyond the limited provisions attached to the Fourth Hague Convention of 1907, on the laws and customs of war on land; these provisions dealt only with the position of civilians in occupied territory. The 1949 convention in theory supplements the 1907 rules; but its arrangements regarding civilians are so much more comprehensive that it will doubtless become the controlling instrument in all situations where it is in force.

The civilians protected by the convention are primarily those who, in case of a conflict or occupation, find themselves in the hands of a state of which they are not nationals. Such persons fall into two categories: al-

iens within the territory of a belligerent state and the population of regions occupied by a belligerent state. Nationals of neutral or co-belligerent states are not protected persons so long as their home state has normal diplomatic representation in the state in whose hands they are; nor are nationals of states not bound by the convention entitled to its protection.

By these definitions the ordinary civilian population of a belligerent state is not within the protection of the convention. There is, however, one major exception to this statement. In Part II of the convention an attempt is made to lay down certain general provisions covering the whole of the populations of the countries in conflict, with the intent to "alleviate the sufferings caused by war". In this part obligations are imposed on the parties to protect and respect wounded, sick and infirm civilians, including expectant mothers; to safeguard civilian hospitals and medical convoys and their staffs; to permit the passage of medical and religious supplies for civilian use, subject to appropriate precautions against misuse; and to take measures to protect and succor children under fifteen.

In the same part provision is also made for the establishment of hospital and safety zones immune from attack. These are analogous to the zones provided for in the first convention, but are to be "so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven". A model agreement, attached to the convention for possible adoption by belligerents, specifies in detail the rules to govern such zones.

The remainder of the convention is restricted in scope to the two categories of civilians described above. With respect to these protected persons, the convention seeks to ensure respect for certain basic human rights and liberties. To this end it prohibits wanton violence to life or person, including torture or inhuman treatment; the taking of hostages; deportations; outrages upon personal dignity; discriminatory treatment based on differences of race, color, sex, religion, nationality and so on; and the infliction of major punishments without previous judicial proceedings affording adequate guarantees to the accused. The internment of civilians is also strictly regulated by detailed provisions which closely resemble those governing the detention of prisoners of war.

Such are some of the leading provisions of the new Geneva conventions now awaiting United States ratification. Unlike many current proposals in the international field, they are not written in the sky: they require only what seems reasonably possible in the hard circumstances of modern war. Yet practicable as they may seem on paper, their effectiveness depends on the measure of acceptance accorded them by States throughout the world. The past history of the Geneva conventions, and the large number of signatories to the current revisions, afford some reason to hope for their general observance should war occur.

Regional Convention Committee Plans Four Regional Meetings

▪ The Regional Convention Committee met at the Drake Hotel in Chicago on July 27 and 28. Attending were Chairman Burt J. Thompson, of Forest City, Iowa, E. Smythe Gambrell, of Atlanta, Georgia, Charles S. Rhyne, of Washington, D. C., Richard P. Tinkham, of Hammond, Indiana, Howard L. Barkdull, of Cleveland, Ohio, Robert G. Storey, of Dallas, Texas, Edward B. Love, of Chicago, Charles B. Howard and W. W. Gibson, both of Minneapolis, Ronald N. Davies of Grand Forks, North Dakota, M. T. Woods, of Sioux Falls, South Dakota, Ingalls Swisher, of Iowa City, Iowa, Edward H. Jones, of Des Moines, Iowa, George H. Turner, of Lincoln, Nebraska, and Walter A. Raymond and Robert L. Hecker, of Kansas City, Missouri.

The committee determined to recommend American Bar Association Regional Conventions as follows: at Minneapolis in the Fall of this year for Minnesota, North Dakota, South Dakota, Wisconsin, Iowa, Nebraska, Missouri and Kansas, under W. W. Gibson as Regional Director; at Louisville, Kentucky in the early spring of 1952 for Kentucky, Indiana, Illinois, Ohio and West Virginia; at Yellowstone National Park in June of 1952 for Colorado, Wyoming, Montana, Idaho and Utah and at Kansas City, Missouri, in the late fall of 1952 for the same states as those served by the Minneapolis Regional Convention.

Each region will eventually establish its own area which it can best serve. It is planned that the Regional Conventions will be semiautonomous to the extent that each region will select its own meeting place, plan its own program, invite speakers of its own choice, make arrangements for entertainment, handle its own funds initially, and place its own limits on expenditures. It was thought that actions taken and resolutions adopted at the Regional Conventions should be recommendatory to the House of Delegates and should be so recommended by the delegates from the regional states in each instance.

Robert G. Storey was appointed Program Adviser and Charles S. Rhyne, Publicity Adviser.

These Regional Conventions, beginning this year at Atlanta and Dallas, have been enormously popular and successful in bringing the national program of the American Bar Association to lawyers who find it difficult to go to more distant Annual Meetings.

Practising lawyer's guide to the current LAW MAGAZINES

Calvin P. Sawyier • Editor-in-Charge

■ In the field of legal periodicals the Age of Symposia is in bloom. More and more, whole issues of the law reviews are being devoted to the treatment of one particular subject. Most current symposia are perhaps worthy of being brought to the attention of the practicing bar because, in these initial efforts at least, there is a conscientious attempt to produce comprehensive, analytical, and up-to-date treatment of subjects upon which there is no adequate text or digest material. The lack of indexing is a definite drawback, but there appears to be a growing tendency to include articles that are limited to specific legal problems and which, along with the titles of the articles, serve to enhance the possibilities for utilizing these issues of the law reviews as basic reference material.

ACCOUNTING—Another symposium issue which has appeared recently is "A Symposium on the Interrelationship of Law and Accounting", to which the Winter, 1951, issue of the *Iowa Law Review* (Vol. 36—No. 2) is devoted. The articles in this symposium on accounting are of a uniformly excellent character and cover subjects of constant interest to the Bar. They are "A Foreword", by Stanley Surrey; "Statement of Legal Concepts of Accounting", by George S. Hills; "Relations Between Lawyers and Certified Public Accountants in Income Tax Practice", by Maurice Austin; "Accounting in the Law School Curriculum", by Ralph Wienshienk; and "The Influence of Administrative Agencies on Accounting", by William W. Wertz. Of more specific application are "Accounting and Statistical Proof in Price Discrimination Cases", by Albert E. Sawyer; "Corporate Accounting Problems", by Harold F. Birnbaum; "Accounting for Estates", by Walter R. Brown; and a note, "Accountant's Liability—For What and To Whom". (Address: Iowa Law Review, College of Law, Iowa City, Iowa; price for a single copy: $2.00.)

ALIENS—*"Alien Seamen and Airmen Under the Immigration Laws of the United States":* by Albert E. Reitzel, *George Washington Law Review*, March, 1951, issue, (Vol. 19—No. 4; pages 367-398). In this article the author, the Assistant General Counsel of the United States Immigration and Naturalization Service, explains the laws and regulations affecting the temporary admission of alien seamen and airmen to the United States. Although this is not an official statement of government policy on the subject, the long experience of the author in the immigration service places him in a position to speak informatively on the subject. The author has outlined the general procedure to be followed in securing permission to land and remain temporarily in the United States, setting forth with particularity the determining factors for inclusion in that class of "bona fide alien seamen and airmen" who are entitled to admission. (Address: The George Washington University, Washington, D. C.; price for a single copy: $1.00.)

ANTITRUST LAW—The Winter, 1951, issue of the *Law Forum* contains a symposium on antitrust law. All the contributors are well-known in the antitrust field and the articles bring both the cases and the legislation down to the date of publication. The articles are as follows: "The Current Status of the Antitrust Laws", by John T. Chadwell and Richard W. McLaren; "Size and Shape: The Individual Enterprise as a Monopoly", by G. E. Hale; "Patents and the Antitrust Laws", by Lawrence I. Wood and Vincent A. Johnson; "Price Discrimination To Meet Competition", by William Simon; "Procedure in Antitrust Investigations", by Robert A. Mitschke; "Equitable Relief Under the Sherman Act", Sigmund Timberg; and, "The Treble Damage Action", by Thomas C. McConnell. There is also a note on "The Law of Unfair Competition in Illinois". (Address: Law Forum, 315 Altgeld Hall, University of Illinois, Urbana, Ill.; price for a single copy: $1.00.)

CONGRESSIONAL INVESTIGATIONS—The Spring, 1951, issue of the *University of Chicago Law Review* (Vol. 18—No. 3; pages 421-686) is devoted to a symposium on congressional investigations. Professor M. Nelson McGeary provides the historical perspective. The legislator's appraisal of legislative inquiry is presented by Senator Fulbright and Representative Meader. Former Congressman Jerry Voorhis describes the

---

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, a price to cover cost plus handling and postage, a planograph or other copy of a current article.

practical politics involved in the initiation and conduct of investigations. The abuses and proposed reforms are considered by Professor Lindsay Rogers and George Galloway. The symposium then proceeds to examine other aspects of the problem. Fritz Morstein Marx discusses the relation of the investigating power to the administrative process and Professor Herman Finer discusses the British Parliament's methods of discharging the various functions carried out by American investigating committees. Professor Edward Shils supplies insights as to why the modern committee operates as it does by examining some of the factors affecting the conduct of legislators. The important role of the press in reporting and analyzing the investigation is the subject of Irving Dilliard's article. This is followed by an examination of the newspapers' immunity from defamation for republishing the words of congressmen. Proceeding from generalization to particularity, Professor Robert K. Carr makes a definitive study of the Un-American Activities Committee and Donald Cook describes the Senate's "Watchdog" Committee. Two case studies of congressional probing conclude the section—the lobbying investigation of 1949 and the Cellar Committee hearings on monopoly power in the steel industry. The issue is rounded out by four book reviews. Rebecca West casts a skeptical eye on the existence of "A Generalization on Trial". Professors Meiklejohn and Horn view "National Security and Individual Freedom" and "Witch Hunt" in the context of the current political and intellectual climate. David Parson is concerned with freedom and the "Legal Control of the Press". (Address: The University of Chicago Law Review, Chicago 37, Illinois; price for a single copy: $1.75.)

DRAFTING—*"Capital Gain Distributions":* In the May issue of *Trusts and Estates* (Vol. 90—No. 5; pages 300-302), Dwight Rogers indicates that the growing popularity of investment company shares will undoubtedly lead to their presence in an increasing number of estates and trusts of the future. Among the questions which this relatively new form of investment has already raised is whether dividends declared by the companies out of capital gains shall be allocated to the life tenant or the remainderman of a trust. While there is strong opinion contrary to the two published decisions awarding such dividends to the life beneficiary, the author emphasizes that the question can be avoided by appropriate language in the trust instrument. He sets forth a number of clauses authorizing the fiduciary to purchase or retain investment company shares and variable forms to express the testator's intention with respect to distribution of capital gains therefrom. (Address: Trusts and Estates, 50 East 42d Street, New York 17, N. Y.; price for a single copy: 60 cents.)

LABOR LAW—*"The NLRB 'Opens the Union', Taft-Hartley Style":* In the Spring issue of the *Cornell Law Quarterly* (Vol. 36; No. 3; pages 443-462) an article by Vincent G. Macaluso takes up the subject of the interpretation and significance given by the National Labor Relations Board to those provisions of the amended National Labor Relations Act which deal with the limitations placed upon the discharge of employees under union security clauses in collective bargaining agreements. The article discusses Board decisions involving the Taft-Hartley union shop and dealing with the employee's obligation of membership, the tender of initiation fees and dues, the extent of dues liability, the distinction drawn between fines and dues and the employer's role in administering this contract provision under the act. (Address: Cornell Law Quarterly, Myron Taylor Hall, Cornell University, Ithaca, N. Y.; price for a single copy: $1.25.)

MILITARY LAW—*"The Uniform Code of Military Justice":* by Rear Admiral George L. Russell, in the January, 1951, issue of the *George Washington Law Review* is a long article setting forth the general nature of the Uniform Code of Military Justice which became effective on May 31, 1951. The author treats the code in a manner designed to give general information to the reader on matters regarding the methods by which offenders will be tried, the rights of defendants and the obligations on the Armed Forces created by the code. The article also deals with qualifications of members of the court and advocates, the jurisdiction of military tribunals and the procedures established for review of their decisions. (Address: The George Washington University Law Review, George Washington University, Washington, D. C.; price for a single copy: $1.00.)

PROPERTY—*"Riparian Rights in Artificial Lakes and Streams":* In this article in the April issue of the *Missouri Law Review* (Vol. 16—No. 2; pages 93-117), Dean Alvin E. Evans comprehensively discusses a problem that is likely to be of increasing importance in view of the recent emphasis on water conservation and power projects. The author examines the various theories that have been suggested in support of the acquisition by owners of land upon artificial lakes and streams of rights corresponding to riparian rights. Rejecting the reciprocal easement doctrine, he concludes that such rights should be recognized when the artificial condition assumes the appearance of a settled condition regardless of whether the water course or lake originates by an event happening in nature or by the hand of man, the period of limitations itself having no unusual significance. (Address: University of Missouri Law Review, 204 Tate Hall, Columbia, Mo.; price for a single copy: 85 cents.)

PUBLIC UTILITIES – Volume 30, issue No. 3 of the *Nebraska Law Review* contains a Symposium on Public Power. "Public Power and

The Federal Government", by Lawrence Potamkin, discusses the right of the Federal Government to engage in the generation and transmission of electric power, who has standing to challenge such activities and the primary legislative and administrative policies that govern such activities. "Regional and River Valley Public Power Development", by Richard M. Freeman, discusses the next stage in the development of our public power system, analyzing the mechanism established by the TVA and other similar "alphabet" agencies. In "Inter-Relationships of Nebraska's Public Power Agencies", Clarence A. Davis presents what is apparently the first legal analysis ever made of the much-discussed interlocking set-up in Nebraska, the "all public power" state. The legal history which has led to the use in some states of power districts, in others of co-operatives and in some states of both forms of agencies for the distribution of rural electric power is outlined in "Public Power Districts and Cooperatives", by Giles H. Penstone. (Address: Nebraska Law Review, College of Law, University of Nebraska, Lincoln, Neb.: price for a single copy: $1.00.)

Views of Our Readers

(Continued from page 617)

too, would not suffer from the objections against world government, for it does not imply that. No degree of sovereignty need be ceded by any nation under this concept. It is not suggested that a world constitution be set up, but rather that a certain body of principles be arrived at, be they those in international law, or in general bearing on the conduct of peoples or governments vis-à-vis those of other peoples or governments, *which could be incorporated within the constitution* of every country. It is only in that sense that it becomes world constitutional law, and not by imposition from the outside. A body of principles embodying world constitutional law could be drawn up by an appropriate commission of the United Nations. But unlike the usual conventions of the United Nations, they should not be proposed for adoption by the United Nations with the ultimate objections frequently met, that they constitute a superimposition on each member state, against which nationality objections too frequently set in. Rather should they be proposed for adoption by each country for incorporation within their respective constitutions, and as constituting, thereby, one set of the fundamental, basic tenets on which the entire political and juridical entity, the state, rests.

How enforce these principles of world constitutional law and order? It must be remembered that they would be the same in the constitution of every country, if once adopted, and the chances are, therefore, that with this basic denominator, the question of sanctions would hardly have to arise on the international scene. For a breach of such principles would not become a breach of international law, with the usual nationalistic-jingoistic interests to becloud the issue, but rather a breach of national constitutional law, with which breach the national citizenry itself would have little patience, and for which the national juridical system would be responsible. It is not presumed that this would be a foolproof system. But it is rare, exceedingly rare, when a people will easily consent to a violation of its own constitution. When world constitutional law and order can become part and parcel of a country's own basic juridical system of guaranteed rights, it is believed that respect for those of one's neighbor, particularly when the principles are precisely the same, would almost automatically result, and along with it peace,—perhaps even without the necessity of international sanctions.

J. B. LIGHTMAN

Paris, France

What Was the First Law School?

■ As a new member of the American Bar Association, perhaps for a time I should be "seen and not heard". But I have just read the fine article of Ira Bernard Dworkin in the May issue of the JOURNAL. I liked it, but I have serious doubts whether everybody can agree with him that the first American law school existed at William and Mary. I am quite positive that the folks in Connecticut would not agree with him, and I am afraid that also goes for some of us who have done considerable research upon the subject. I think many of us have been largely of the opinion that Tapping Reeve established the first law school at Litchfield, Connecticut, in 1784. In fact, he was giving legal instruction as early as 1774, and his first student was his brother-in-law, Aaron Burr.

I have written an article upon the subject myself, and am enclosing a copy for the record. I do not want to appear pedantic, but I still hope I have not been too wrong in considering the many authorities I have read concerning our first law schools.

BURTON S. HILL

Buffalo, Wyoming

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.

Stock Purchase Agreements—Some Recent Developments

■ In our May, 1949, issue we discussed some of the tax problems which are involved in corporate stock purchase agreements (35 A.B.A.J. 433). Typically this is a contract between a closely held corporation and one or more of its shareholders under which the corporation is to purchase its stock from the shareholder's estate at his death. The object from the point of view of the company is to preserve continuity of management and control and from the point of view of the estate, to provide cash for estate taxes. Normally the purchase commitment or option is financed by life insurance on the shareholder's life.

In our 1949 note we pointed out some of the tax risks which are inherent in such a plan. Recent developments have reduced or eliminated a few of those risks.

(1) The *Emeloid* case. The company must be prepared to show a "business purpose" for the purchase of the insurance. Otherwise—if the plan were to be considered merely as a means of investing surplus funds in life insurance for the benefit of the shareholders—dire consequences might be visited upon the company and the insured shareholders. The company might find itself faced with a Section 102 penalty tax (for unreasonable accumulations); the shareholder might be considered to have received taxable dividends equal to the premiums, which in turn might be treated as paid by the shareholder to the insurance company, thereby bringing the proceeds into his estate under Section 811 (g). This is the stuff that tax lawyers' nightmares are made of.

The Third Circuit has recently allayed some of these fears. In *Emeloid Company, Inc.* v. *Commissioner* ——F. (2d) —— (1951 CCH, Par. 66, 013), stock of the taxpayer corporation was owned equally by two shareholder-officers. In 1942 the company took out a $100,000 single premium policy on the life of each, financing the purchase largely by a bank loan. The issue was whether this indebtedness qualified as "borrowed capital" for excess profits tax purposes. This turned on whether the loan was incurred for a bona fide business purpose. (Cf. Section 439(b)-(1) of the 1950 Excess Profits Act). The Tax Court had upheld the Commissioner, 14 T.C. 1295, drawing a distinction between key-man insurance, designed to compensate for the loss of a key employee, and stock purchase insurance, the proceeds of which are committed to the acquisition of the company's stock for the benefit (according to the Tax Court) of its surviving shareholders. The Tax Court was reversed by the Third Circuit. The appellate court took the view that the purchase of this insurance was justified by a sound corporate business purpose—"to provide for continuity in the management and policies of the company". The indebtedness was therefore includable in the company's borrowed capital.

The excess profits tax aspect of this decision is important: the company's credit may be increased by 12 per cent of three-fourths of the indebtedness incurred to carry such insurance. But the case has broader implications: it provides the company with a strong defense against the application of Sec. 102; and premiums paid by a corporation for its own sound business reasons can hardly be considered as paid to or on behalf of its shareholders.

(2) Sec. 115 (g) (3). In our May, 1949, note we mentioned the possibility that money paid by a corporation to a shareholder's estate in redemption of some of the decedent's stock might be taxed as a dividend under Sec. 115(g). This risk has been eliminated under certain circumstances by the 1950 amendment. If the stock constitutes more than 50% in value of the net estate and if the payment is not in excess of the death taxes (state and federal) the dividend statute is made inapplicable. The new statute is discussed in greater detail in "Tax Notes" for November, 1950, at page 942.

(3) Double estate tax. On a number of occasions the Commissioner has asserted an estate tax not only on the value of the decedent's stock or business interest, but on the proceeds of the life insurance as well, although the estate has received the insurance money in place of the stock. The latest case is *Estate of G. C. Ealy*, CCH Tax Court Reporter, 18, 302M. Insurance on the shareholders' lives was taken out and paid for by the company pursuant to a shareholders' agreement. The proceeds were to be allocated to the surviving shareholders and used by them to buy the decedent's stock. Ealy owned about half of the outstanding stock and the $140,000 purchase price received by his estate from the surviving shareholders included $50,000 of life insurance. The Commissioner's attempt to tax both the stock and the insurance money was rejected by the Tax Court on the authority of earlier cases. See *Ray E. Tomkins Estate*, 13 T. C. 1054; *John T. H. Mitchell*, 37 B.T.A. 1.

(4) Valuation. One of the advantages of a stock purchase agreement is that it tends to avoid a runaway valuation of the decedent's stock for estate tax purposes. Stock of a closely held corporation is seldom sold in an arm's length transaction. Its fair market value is therefore a mat-

ter of judgment depending on a great many factors not reflected in the balance sheet, including the company's earnings history. The typical stock purchase agreement requires the estate to sell at current book value or on the basis of a formula related to book value. If the sale of the stock is restricted during the shareholder's life this type of agreement will fix the value of his stock at death. It limits the amount which the estate can realize for the stock.

This rule was applied recently by the District Court for the Western District of New York in an extreme and unusual case, *H. A. May et al. Exrs.* v. *McGowan,*—F. Supp.—— (CCH Estate Tax Service, Par. 10,808). The decedent and his son were equal shareholders. The son was given the right to purchase his father's stock at the latter's death at $100 per share less a pro rata portion of the company's bank loan then unpaid. At the father's death the bank loan adjustment reduced the price to zero and the stock passed to the son without payment. The District Court sustained a zero value and ordered a refund of the estate tax attributable to the stock. See *Wilson* v. *Bowers,* 57 F. (2d) 682; *Lomb* v. *Sugden,* 82 F. (2d) 166.

Entertainment for Seventy-Fourth Annual Meeting

■ The Joint Committee for Entertainment of the 74th Annual Meeting of the American Bar Association, which is composed of representatives of The Association of the Bar of the City of New York, the Bronx County Bar Association, the Brooklyn Bar Association, the New York County Lawyers' Association, the New York State Bar Association, the Queens County Bar Association, and the Richmond County Bar Association, under the General Chairmanship of Harrison Tweed, has announced the entertainment program for the Annual Meeting. The Committee has prepared a schedule of entertainment that avoids regimentation and will leave members free to do and see what they most want to do and see in New York. The Flamingo Room on the lobby floor of the Waldorf-Astoria will be open every day throughout the meeting for members and, more particularly, for their wives and friends. This will be a rendezvous where individuals and groups may meet and where full and authentic information about day and night life in New York can be obtained. Coffee and tea and other refreshments will be served there.

The first event on the entertainment program will be a reception at the House of The Association of the Bar of the City of New York on Sunday, September 16, to which all members and their guests are invited. On Tuesday there will be a fashion show at the House of the Association. On Wednesday afternoon the Committee has planned, through the courtesy of The Port of New York Authority, a boat tour down the Bay and around Manhattan Island. The facilities of the Port and points of interest in the harbor will be pointed out. At the end of the tour the boat will dock near the Battery and members will be taken to the attractive building of the New York County Lawyers' Association for a reception.

Arrangements are being made to provide tickets to radio and television shows and to the Aqueduct Race Track. For golfers there will be an opportunity to play at some of the best country clubs in the vicinity of New York.

Since the Joint Committee believes that a great many of those attending the meeting will want to see one or more of the topnotch musicals which will be playing in September and some of the plays, tickets have been secured for these shows. The Committee emphasizes, however, that it will not be possible to hold these tickets indefinitely and urges that members order their tickets immediately. The principle of first come first served will be rigorously enforced. Tickets for the following musicals at the prices indicated, which includes the $1.20 legal fee for ticket brokers, are available for the evening performances on September 17, 18, 19 and 20:

Call Me Madam	$8.40
Guys and Dolls	7.80
South Pacific	7.20
A Tree Grows in Brooklyn *(No tickets available for September 19)*	8.40

There is a reasonable expectation that tickets for the following plays will be available on short notice, but the Committee suggests that members should make reservations for these plays at once. Prices include the $1.20 brokerage fee.

The Rose Tattoo	$6.00
Season in the Sun	6.00
Stalag 17	6.00
Twentieth Century	6.00
The Moon Is Blue	6.00
Affairs of State	6.00
The Happy Time	6.00
Darkness at Noon	6.00

All tickets should be ordered from Charles Peck, McBride's Theatre Ticket Offices, Inc., 1493 Broadway, New York 18, New York, and a self-addressed stamped envelope and check or money order should be sent with the order for tickets. Members desiring order forms can secure them by addressing the Joint Committee for Entertainment, 42 West 44th Street, New York 18, New York. These forms, however, are not required.

OUR YOUNGER LAWYERS

Richard H. Bowerman, Secretary and Editor-in-Charge, New Haven, Connecticut

Conference Plans for Gala Meeting in New York

ROBERT LOCKWOOD
Chairman, Annual Meeting Committee

■ Although the American Bar Association was organized in Saratoga Springs, New York, in 1878, the Association will rendezvous in New York City this mid-September for the first time, on the occasion of its 74th Annual Meeting. The Junior Bar Conference Annual Meeting Committee, Chairman Robert Lockwood, of New York City, and his crew of hard-working Committee members, are completing arrangements for this historic meeting, and have announced that the Hotel Belmont Plaza will be the headquarters of the Junior Bar Conference.

Spurred on by the encouragement and assistance of your Conference officers, every effort is being made to make this pilgrimage to New York a memorable one. Presiding at the meeting will be J.B.C. National Chairman Charles H. Burton. Activities will commence on Saturday, September 15, with a full day of meetings of the Executive Council and of the judges of the Awards of Merit Committee.

On Sunday, September 16, at 9:00 A.M., there will be a meeting of the delegates from Affiliated Junior Bar Groups in the Blue Room of the Hotel Belmont Plaza, presided over by Richard H. Bowerman, national secretary of the J.B.C. This will be followed by a luncheon in the exquisite Moderne Room of the Hotel Belmont Plaza, with a speaker of national prominence, as the principal attraction. Presiding at this function will be Chairman Charles H. Burton. The afternoon will be devoted to the first general session of the Conference, with Paul W. Lashly, national vice chairman presiding.

After the full activities of Sunday, the Conference will take a breather on Monday morning. The meetings of the Nominations, Resolutions and Awards of Merit Committees will take place on Monday afternoon. Then at 4:00 P.M., the feature of the day will be the participation of four Junior Bar members in a debate under the sponsorship of the Conference on Personal Finance Law. Judge Frank Day of Portland, Oregon, has already accepted and others who have been invited are W. Carloss Morris, Jr., of Houston, Texas, Lewis R. Donelson III of Memphis, Tennessee, and William F. Womble of Winston-Salem, North Carolina. The debate will be held in the Moderne Room of the Hotel Belmont Plaza.

Tuesday morning will commence with the second general session of the Conference which will take place in the beautiful Baroque Room of the Hotel Belmont Plaza. Then will occur one of the highlights of the Convention when the Junior Bar Conference will sponsor jointly with the Section of International and Comparative Law a luncheon to be held at the Hotel Waldorf-Astoria, which is just across the street from our headquarters, the Hotel Belmont Plaza. The outstanding international figure who has already accepted an invitation to be the main speaker at this significant function is the Honorable Thomas E. Dewey, Governor of the State of New York.

In the afternoon there will be a round-table discussion on the subject of job opportunities for young lawyers. The panel will consist of outstanding leaders from industry, banking, government, law and the judiciary. The discussion will be open to law students as well as Conference members, with questions to be invited from the floor. It is anticipated that this will provide the occasion for a stimulating exchange of views of value to all attending, whether on the threshold of a career in law, or about to graduate from Conference membership.

With all the business concluded, the grand finale of the Conference Annual Meeting will be a dinner-dance to be held in the air-conditioned East Ballroom of the Hotel Commodore, on Tuesday evening at 8:00 P.M. John Horan is Chairman of the Committee on Arrangements for this get-together of Conference members, their wives and guests. Music for the dance has been arranged with a popular orchestra leader and the music will continue to 2:00 A.M., or longer if the mood is there, so that the Annual Meeting is sure to end on a high note of festive gaiety.

Of especial interest to all, a Joint Committee for Entertainment, organized by the local bar associations, on behalf of the host city, has been busily engaged in preparing a splendid welcome for all members of the American Bar Association. While all arrangements are not as yet completed, two outstanding features should be noted. A reception at the House of The Association of the Bar of the City of New York has been arranged for Sunday evening, September 16, to which all members and their guests are invited. Also, the Flamingo Room on the lobby floor

of the Hotel Waldorf-Astoria will be open throughout the meeting as a rendezvous for the members, their wives and friends. Coffee, tea and doughnuts will be furnished and other refreshments will be available. In addition, a fashion show for the ladies and a harbor-boat tour around Manhattan Island are being scheduled.

Of course, all of the foregoing is fragmentary and incomplete but is as much as space permits. It need not be emphasized that all of New York City's exciting and diversified media for fun, frolic and frivolity will be awaiting one and all. Full information about other activites will be available for those in attendance, upon registry at the Hotel Belmont Plaza. Be sure to arrange for your reservations immediately, and, above all, be sure to be there.

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ The Public Relations Committee of the Utah State Bar and the Trust Section of the Utah Bankers Association sponsored jointly a series of thirteen radio programs. Each program was a dramatic sketch portraying a legal situation and designed to explain the following points:

1. The need for a will and trust to solve estate problems.
2. The danger in a failure to have a suitable corporate guardian for a youthful heir.
3. The danger of intestacy in the event of an unliquid estate.
4. The invalidity of a conditionally delivered deed.
5. The use of a buy-and-sell agreement to liquidate a partnership interest.
6. The use of an educational trust to supplement an alimony or child support decree.
7. The dangers in the unadvised use of the joint tenancy device.
8. The use of a guardian to administer the infant's share of a judgment.
9. The danger of a disposition by gift in an attempt to avoid probate and inheritance tax.
10. The advisability of a guardianship for an incompetent spouse.
11. The use of the property management service of a trust department to provide for an improvident widow.
12. The necessity for estate planning generally to avoid many unforeseen problems and particularly the problem of an estate which does not have sufficient cash to satisfy immediate taxes, probate and last illness expenses.
13. The advantages of a corporate executor as against an individual executor.

The Trust Section of the Utah Bankers Association contributed approximately three-fourths of the cost of this series, which was in excess of $4,000.

The series was given promotional newspaper advertising space by the various radio stations and also promotional advertising on the various stations. Newspaper mats were made up and distributed to the stations for use in this connection.

■ The Kentucky State Bar Association is again sponsoring a law students' apprenticeship program. Interested students are encouraged to file applications, specifying the period during the summer during which they wish to serve as apprentices and the community in which they wish to serve. The committee in charge of the program then arranges the apprenticeship. Lawyers taking students as apprentices are expected to permit the student to work on practically every type of legal problem that may be current in the lawyer's office. The forty students who participated in the program last year, as well as the lawyers in whose offices they served as apprentices, were uniformly enthusiastic about the program.

■ The Council of the Boston Bar Association is conducting a poll of the membership of the Association on six proposals brought forward in a report of a special committee to inquire into Communism within the Bar. The proposals being voted upon include recommendations that the Association expel from its membership any individual found to advocate the overthrow of the Government of the United States by force or violence; that application be made to the Supreme Judicial Court for the promulgation of a rule removing from the rolls of members of the Bar any person who is a member of the Communist Party; that the Association pledge its active support to legislation which seeks to eradicate existing Communism; that the Association announce its approval of an oath by members of the Bar pledging loyalty to the Federal and Massachusetts Constitutions in opposition to Communism; that the Association expel any member who refuses to take any loyalty oath that the legislature may require; and that the Association take no action against any member who now repudiates advocacy of the overthrow of the Government by force or violence and withdraws from all organizations advocating such overthrow.

■ The Queens County (New York) Bar Association held a joint meeting with the County Medical Society and the Dental Society. This is an annual event with the Queens Association. This year's speaker was Harry A. Gair, who spoke on the medical witness in court.

■ Robert E. McKean, a leader in Association activities for the past

decade, was elected President of the Detroit Bar Association, June 12, at a meeting of the Board of Directors. Other officers elected were Frederick McGraw, First Vice President; Henry A. Montgomery, Second Vice President, Nathan B. Goodnow, Treasurer; and Henry R. Bishop, Secretary.

Succeeding Leo I. Franklin, retiring president, Mr. McKean will assume leadership of one of the oldest bar associations in the United States in the 116th year of its history at a time when its membership is at an all time peak of 2559 attorneys.

Activities of Sections and Committees

SECTION OF JUDICIAL ADMINISTRATION

▪ The Committee on Judicial Administration in Metropolitan Trial Courts has requested an additional appropriation of $1,000 to continue the Metropolitan Court Survey. Several studies of metropolitan trial courts similar to the one made in the Detroit area will be undertaken in such metropolitan localities as New York, Chicago and San Francisco. The $1,000 is to be used in preparing a reconnaissance or "blueprint" prospectus which will be submitted to groups who may be willing to cooperate in the enterprise.

SECTION OF INSURANCE LAW

▪ This year all meetings of the Section at the Annual Meeting will be held in the grand ballroom of the Roosevelt Hotel. The usual separate round-table meetings will not be held and all papers will be presented in the open meeting so that each member of the Section may have the opportunity of hearing the papers given by all of the committees. On Wednesday, September 19, the entire morning will be given over to a program consisting of a panel on "Trial Tactics" prepared by Forrest A. Betts.

COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

▪ Representatives of the life insurance business and the American Bar Association held a joint meeting at the Edgewater Beach Hotel in Chicago on June 28 and 29, and organized a conference committee for the consideration of problems affecting the public interest in which they are mutually concerned.

Representing the life insurance business were Vincent B. Coffin, Senior Vice President, The Connecticut Mutual Life Insurance Company, Hartford, Connecticut; Deane C. Davis, President, National Life Insurance Company, Montpelier, Vermont; Roger Hull, Executive Vice President, The Mutual Life Insurance Company of New York, New York City; Powell B. McHaney, President, General American Life Insurance Company, St. Louis, Missouri; H. Bruce Palmer, Executive Vice President, The Mutual Benefit Life Insurance Company, Newark, New Jersey; H. S. Redeker, General Counsel, The Fidelity Mutual Life Insurance Company, Philadelphia, Pennsylvania; Sylvester C. Smith, Jr., General Counsel, the Prudential Insurance Company of America, Newark, New Jersey; William P. Worthington, Executive Vice President, Home Life Insurance Company, New York City, and John Barker, Jr., Vice President and General Counsel, New England Mutual Life Insurance Company, Boston, Massachusetts.

Representing the American Bar Association are John D. Randall, Cedar Rapids, Iowa; Thomas J. Boodell, Chicago, Illinois; Warren H. Resh, Madison, Wisconsin; Cuthbert S. Baldwin, New Orleans, Louisiana; A. James Casner, Cambridge, Massachusetts; E. N. Eisenhower, Tacoma, Washington, and Edwin M. Otterbourg, New York City.

Also in attendance at the Conference were Henry R. Glenn of New York City, Associate General Counsel of the Life Insurance Association of America and Ralph H. Kastner of Chicago, Illinois, Associate General Counsel of the American Life Convention.

▪ The Committee on American Citizenship of the State Bar of Texas, of which John Ben Shepperd is the Chairman, has sponsored a program to encourage citizens of Texas not to ask to be excused from jury duty during the month of May. The committee asked over two thousand civic organizations throughout the state to hold jury service programs during May, with lawyers of their membership or local lawyers as speakers. Material for speakers was prepared by the committee. In order to make a more intensive study of the jury problem and possible solutions, and to obtain program material, the committee sent fifteen hundred jury service questionnaires to judges, district attorneys and lawyers. Information obtained from the questionnaires was compiled in pamphlet form and five thousand copies mailed out over the state. Several thousand laymen were also polled as to their views on jury service. Governor Allan Shivers proclaimed May as "Jury Service Month". Newspapers devoted editorial and news stories to the program.

Emancipation of the Judiciary
(Continued from page 590)

state conventions, that could be taken as remotely implying that anyone believed that Congress was given the power to create a tribunal exercising judicial power which would not be "inferior to the Supreme Court" with nonprecarious tenure for its members. Such an argument, if valid, would have ended the debates and the proposed Constitution. When Gerry refused to sign the Constitution and cried, "Star Chamber", he was careful to define such Star Chamber as a tribunal, though inferior to the Supreme Court, yet proceeding without a jury in civil cases.[48] If anyone had argued "quasi-judicial tribunal" as one not falling under Article III, he would have been justly branded a charlatan.

Our Forefathers would have known that "quasi-judicial" is simply "judicial" with a Roman handle. They were prepared for the adulteration of "judicial" with some other ingredient. Such alchemy had been tried on them before. The British Board of Trade and the Privy Council, in its colonial aspects, were the most perfect examples of "quasi-judicial" tribunals history afforded to them aside from the old Star Chamber and High Commission. It was they who rammed the King's "prerogative" down their throats.

It was the privy Council, acting in its "quasi-judicial" capacity, that had caused George II and George III to disallow scores of court bills enacted by colonial assemblies from 1752 to 1774, extending justice to their frontiers and giving to judges nonprecarious tenure, because they were "subversive of the Constitution and restrictive of Your Majesty's just Rights and Prerogative . . . thereby setting aside the effect of one fundamental Principal of the Constitution of the British Colonies." Furthermore, they said, nonprecarious tenure tended "to lessen that just dependence which the Colonies ought to have upon the government of the mother country . . . [and was] . . . highly prejudicial to the just rights of the Crown and the Acts of Trade".[49]

It was this "quasi-judicial" body that had prepared for the signature of George III the instruction to the governors of all royal colonies on December 9, 1761, as follows:[50]

> Whereas laws have been lately passed or Attempted to be passed in Several of our Colonies in America enacting that the Judges of the Several Courts of Judicature or other Chief Officers of Justice in the said Colonies shall hold their Offices, during good Behavior; And Whereas the Governors or other Chief Officers of Several others of our Colonies have Granted Commissions to the Judges or other Chief Officers of Justice; by which they have been empowered to hold their said Offices during good Behavior, Contrary to the express Directions of the Instructions given to the said Governors or other Chief Officers by us or by our Royal Predecessors; And Whereas it does not appear to us, that, in the present Situation and Circumstances of our said Colonies it would either be for the Interest or Advantage of the said Colonies, or of this our Kingdom of Great Britain that the Judges or other Chief Officers of Justice, should hold their Offices, during good Behaviour; It is therefore our express Will and Pleasure that you do not upon any pretense whatever *upon pain of being removed from your Government* give your assent to any Act, by which the Tenure of the Commissions to be granted to the Chief Judges, or other Justices of the Several Courts of Judicature shall be regulated, or ascertained in any manner whatsoever; and you are to take particular care in all Commissions to be by you Granted to the said Chief Judges, or other Justices of the Courts of Judicature that the said Commissions are Granted, *during Pleasure only*, agreeable to what has been the Ancient practice and usage in our said Colonies and Plantations.

Against such a background of experience, Blackstone,[51] Adam Smith,[52] Montesquieu[53] and others were screaming to the founders of the Republic, from the printed page, that it matters not what they wrote in Philadelphia—it matters not what laws and charters may say, "There can be no liberty if the judiciary be not separated from the executive and the legislative." With the help of God and the English language, they meant to emancipate one so as to achieve the other.

Servile Tribunals and the Military—Weapons of Tyrants

Our Forefathers may have been "reactionary", but they weren't fools. They knew the devious ways employed by rulers to reach the utmost verge of their powers, and then roam at large in forbidden fields. They knew that the purpose of all delineating bulwarks is to halt rogues —not angels! They knew that tyrants exert force by only two instrumentalities, *viz.*, servile tribunals or the military. Article III was plainly worded so as to seize and emancipate every "tribunal" possible to be created under Article I. The Framers intended that if their children should ever lose their liberty by the old servile tribunal method, the judges who sanctioned it should forfeit the respect and earn the contempt of all mankind, including children.

Those disciples of Karl Marx who interpret American history and construe the Constitution on the basis of "class antagonisms",[54] are strangely silent when they come to the judiciary provisions of the Constitution. They do not even reveal, much less explain, that among the relatively few things that met the unanimous approbation of all men in the Constitutional Convention and in the state ratifying conventions, were the provisions emancipating judges from control or influence by any other branch of government by nonprecarious tenure and pay, and rendering the legislative branch powerless to erect any tribunal exercising judicial power except one whose members should hold their offices by such a tenure. Those who opposed the congressional power to create any inferior tribunals on account of jeal-

48. 2 Farrand, 633.
49. 6 *Colonial Records, North Carolina* 582, 586, 587, 591, 987; 9 *New Jersey Archives* 321; 7 *New York Colonial Documents* 476. 8 *Pennsylvania Colonial Records* 543. IV *Acts of Privy Council* 216, 502, 5 *id.*, 166. 11 *Board of Trade Journal* 229, 233, 234. Weston, *Documents, Hist. S. C.* 138, 141, 143.
50. 6 *North Carolina Colonial Records* 592.
51. 1 *Commentaries* 267, *et seq.*
52. *Wealth of Nations* 681.
53. *Spirit of Laws*, Book XI.
54. *Capital and Other Writings of Karl Marx* (Carlton House Ed. 1932) 361.

ousy for state tribunals, when defeated, joined with all "classes" in settling forever any question as to the tenure of the members of such tribunals. *Given a choice, all rejected the high road to tyranny.*

Why don't the records of the conventions tell the whole story? If there is no controversy, there is no debate. If there is no debate, there is no record of debates. Madison buried that story with the notation: *"Nem con."* 2 Farrand 44, 315, 320.

George Mason refused to sign the Constitution for the reason that it did not give to the judiciary the weapons inherent in a Bill of Rights, to repel the assaults of power against the liberties of men. But for an independent judiciary, as the recipient of *all* judicial power the Constitutional Convention would have been a Timon's banquet for the masses of men. Every devotee of human liberty realized that an independent judiciary was the "sole protection against a tyrannical execution of the laws" to be enacted by the legislative branch.[55]

The argument of "expediency" is often heard to support power. No argument as to expediency can appeal to the mind of an honest judge looking upon his charter. The Temple of Justice was never intended to be a castle of Morpheus nor the judicial robe a sleeping gown. Whatever a man in a business suit may do judicially under the title of "member", he may also do in a judicial robe under the title of "judge". If not, he is unfit to wear such robe. How the Colony of Virginia in 1658[56] changed its court procedure so as to make unnecessary any executive or administrative courts, such as admiralty, chancery, exchequer, etc., and the success of this system for seventy-five years until finally broken down, under the heavy-handed power of the throne;[57] and the belated and partial accomplishment of the same objective by the new rules of federal procedure in federal courts, are other answers to the argument of expediency. Federal tribunals were left unfettered by the common law and its obsolete procedure, as an answer to those who might urge the creation of servile tribunals as necessary or proper, procedurally, for exertion of judicial power.

The argument of "prior legislative exposition" is heard to support power. *Precedents of usurpation of power create no legal authority.* Upon the integrity of that principle rests the validity of every right man has ever wrested from power, and every liberty he has ever torn from tyrants.

Should We Emulate the Stuart Kings?

In 1631, Charles I said it was necessary and proper that he have vigorous and expanded executive courts at his disposal to effectuate his royal will, in the interest of "good government and to avoid delays". Hence he named all the members of his Council severally to a standing committee to fix the jurisdiction of all the courts of England, reserving to the Star Chamber, High Commission and other irregular tribunals, in the North, in Wales and elsewhere, that which he wanted them to have, saying.[58] "It being manifest that our Justce . . . is originally and in Sovereignitye onlye and intyrely in ourselves."

If it is "necessary and proper" for Congress to emulate Charles I, it is "necessary and proper" that our Constitution be amended. While the people turned over to their emancipated judges the "keys" to their Constitution to enable them to keep and guard it for them, they retained in themselves the sole right to change its structure. Any usurper of that right, though he be one of the guards, and a whimpering "liberal", is but a traitor within the gates—a constitutional "Quisling"!

Such an amendment was twice rejected on August 27, 1787, in Philadelphia. A motion was made to insert in Article III, Section 3,—"In all the other cases before mentioned[59] the judicial power shall be exercised in such a manner as the legislature shall direct." The motion was defeated, only two states voting for it.[60] Next a motion was made to strike from the August 6 draft, as reported by the Committee of Detail, the following appearing in Article III, Section 3: "The legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time". That motion to reject carried unanimously.[61]

Thus ended the last effort at Philadelphia to establish a federal judiciary that could be rigged by the party in power to effectuate transient policies. At last the judiciary became a *tribunus plebis* and was retained by the people as a check upon the propensity of all governments in all ages to usurp powers at the expense of individual freedom.

Only Mason, Gerry and Randolph refused to affix their names to the completed document. The common people were not so unanimous. They knew that liberty always loses in effectiveness that which the government gains in power. They still worshipped their martyrs such as Algernon Sidney who had told them:

55. 3 Elliott 539, 548, 552.

56. 1 Hening, *Statutes of Virginia* 486. 5 Virginia Magazine of History 5, 57. Beverly, *The History and Present State of Virginia* 94, 97, 255, 256.

57. An attempt in New York to adopt the Virginia procedure was disallowed by the Crown in 1704. Russell, *Review of Colonial Legislation* 140.

58. 19 Rymer, *Foedera* 280.

59. Meaning all cases other than those relating to impeachment of the President, to ambassadors, etc., as to which the Supreme Court was given original jurisdiction.

60. 2 Farrand 431. Note: Why did Madison wait until his old age to insert in his notes in different ink that Virginia and Delaware were the states voting for this disgraceful motion? Why did he fail to record that it was he, Randolph and Dickinson that sponsored it? Why was Randolph in a bad humor from this day on? What were the bitter words used? Why were Virginia and Delaware ashamed to vote for the less offensive measure next proposed? Why did new alignments take place that day in Philadelphia? Why did Madison hate George Mason from this day on? Was Madison's defeat for the Senate in Virginia a part of the price of secrecy? Why did he, as a lowly representative in Congress, expound the treacherous doctrine of "legislative interpretation" of the Constitution, after having early in the Convention and earlier in Congress decried such a thing? The answers are not too difficult but are too long to detail here.

61. 2 Farrand 431.

"Man is of an aspiring nature, and apt to put too high a value upon himself; they who are raised above their brethern, though but a little, desire to go farther; and . . . they think themselves wronged and degraded, when they are not suffered to do what they please."[62] Patrick Henry was their spokesman: "Human nature will never part from power. Look for an example of a voluntary relinquishment of power, from one end of the globe to the other—you will find none."[63] They, like him, were unwilling to "depend on so slender a protection as the possibility of being represented by virtuous men."[64] "Virtue will slumber."[65] While an emancipated judiciary was preserved to them as the "sole protection against a tyrannical execution of the laws",[66] they were not satisfied. They agreed with Patrick Henry: "My great objection to this government is, that it does not leave us the means of defending our rights or of waging war against tyrants."[67] More legislative sails and executive rigging had to come down and more judicial anchorage had to go in. An arsenal of weapons must be given to the judiciary to enable it to wage the ever recurring "war against tyrants".

"No Bill of Rights, no Constitution" was the watchword among the sons of the Sons of Liberty. At last George Mason's Bill of Rights became the seal of an instrument that should limit power as well as confer power. Nine of the first Ten Amendments gave to the judiciary powerful weapons to use against tyrants. The other amendment (the second) guaranteed "the right of the people to keep and bear arms" as "necessary to the security of a free state".

When a servile and corrupt judiciary abandons the people and enlists in the service of those who would enslave mankind by the age old methods of tyrants, the rifle over the "fire board" is the last slender "security of a free State". It served its purpose well from 1773 to 1776 as Sons of Liberty cried out their watchword, "To Your Tents, Oh Israel",[68] and drove servile judges to a haven in His Majesty's ships.[69] But the despots who sit secure under the effigy and ensigns of freedom in the twentieth century, cannot so readily be deposed by such methods.

Have We Nullified the Revolution?

Those who rest in unmarked graves from Lexington to Yorktown were not fighting to decide *who* should govern, but to decide *how* they and their children should be governed. Was it all in vain? Have we nullified the American Revolution? Is our Constitution a cruel hoax? Does not an emancipated judiciary stand as the last barricade on the road from Moscow to Washington?

If we have turned back the clock more than three centuries, and have reverted to John Locke's[70] "appeal to Heaven", then let us start again with Sir Edward Coke's prayer: "God send me never to live under the law of convenience or discretion."[71]

---

62. Discourses on Government 176.
63. 3 *Elliott's Debates* 174.
64. 3 *Elliott's Debates* 327.
65. 3 *Elliott's Debates* 165.
66. 3 *Elliott's Debates* 539.
67. 3 *Elliott's Debates* 47.
68. This was the watchword of revolt of the ten tribes of Jerusalem, when they separated from Rehoboam. It was the watchword in the Puritan Revolution, becoming such when a man by the name of Walker threw a pamphlet so entitled into the carriage of Charles I, as he drove through a cold and muttering crowd on his way from Whitehall to Guildhall to try to effect the arrest of Hamden, Pym, Holles, Strode and Haslerig, for questioning his prerogative to rule despotically through the instrumentality of a servile judiciary. Guizot, *History of the English Revolution of 1640*, 134. It became the watchword of the Sons of Liberty in a like cause. Bowen, *John Adams and the American Revolution* 281.
69. John Marshall, *History of the American Colonies* 422. Raynal, *British Trade and Settlements in North America* (1779) 329. Cushing, *Transition in Massachusetts from Colony to Commonwealth* 86. Bowen, *John Adams and the American Revolution* 436, *et seq.* Miller, *Origins of The American Revolution* 369.
70. John Locke, *Civil Government*, Chap. XIV, par. 168.
71. 2 *Rushworth Collections* 4. Said by Coke in 1628 while urging that Charles I had no power to constitute a tribunal not inferior to the King's Bench for the purpose of effectuating executive policies.

Freedom of Information

(Continued from page 570)

position of our founding fathers was a miserable mistake.

Many Americans, even lawyers and newspaper men, often feel that international affairs and international treaties are the concern of politicians and statesmen and not of the average citizen. The time has arrived when we are faced with a new concept in international affairs and international law which directly concerns every individual citizen in this country.

There is a trick provision in the Covenant which is intended to reassure Americans. It is Article 18, Paragraph 2, which provides:

> Nothing in this Covenant may be interpreted as limiting or derogating from any of the rights and freedoms which may be *guaranteed* under the laws of any Contracting State or any conventions to which it is a party.

This clause undertakes to preserve such greater rights as may already exist in any country, but many of our rights arise through a restraint on "Congress" to deny or abridge basic rights but not as a restraint on the treaty-making power. Thus, many questions of conflict will arise as to whether our Bill of Rights protects us against treaty-made law. This is not an effective saving clause for many other reasons—one important one being disclosed in cases like the alien land law case and the mixed marriage case where it is a question of the right of the people of a particular state to legislate for themselves. Many of our freedoms in this country lie in a concept not covered by any such phrase as "guaranteed under the laws of the Contracting State". This clause clearly discloses how little attention the American representatives in the United Nations pay to basic American constitutional principles. Our rights to freedom of speech and of press and of religion and of assembly are not "guaranteed" by any laws of this country. They are rights reserved to the people of the respective states. The Bill of Rights says that as such they shall not be abridged, but the Bill of Rights does not grant these rights; so that the so-called "saving clause", that nothing in the Covenant shall be interpreted as limiting or derogating from the existing rights or freedoms which are guaranteed under the laws of a contracting state, is ineffective language.

It is doubtful whether any such saving clause, however phrased, would fit the situation. Why should we run any risk of language in connection with these precious freedoms? Why should the United States approve restrictions for others with the assurance that perhaps they will not apply to the people of the United States? All of us as citizens are vitally concerned, but certainly the press is concerned in addition by reason of the fact that these proposals are a direct attack on the newspaper profession.

We too often take the continuation of free government for granted. In so doing we can easily lose our rights and freedoms in the entanglements of international commitments and agreements, unless we, as citizens, become articulate and insist that our basic rights under the Constitution and our own Bill of Rights shall not be rewritten, leveled out, compromised and confused by nebulous and ambiguous international treaties.

The effect of trying to incorporate in international documents these rights and freedoms that American citizens enjoy—whether under state or national constitutions—is to make them international rights and matters of international interpretation and give foreign governments, as well as individuals and pressure groups in other countries, the right and opportunity to challenge our own interpretation of our own rights by our own courts. Why shouldn't we keep sacred the rights we have under our own Bill of Rights—our freedom of speech and freedom of press and all our other basic individual rights? Why should we give them away? Why risk their impairment by international restatement and international interpretation? We should no more countenance an international rewrite of our basic rights than we would countenance an international rewrite of The Ten Commandments.

No man can go far who never sets down his foot until he knows the sidewalk is under it. No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen,—to dig by the divining rod for springs which he may never reach.

—Justice OLIVER WENDELL HOLMES

Oil and Gas Law

(Continued from page 574)

which could be upon the same structure. Permits were granted for a term of two years and if the permittee discovered valuable deposits of oil and gas during the life of the permit, the permittee was awarded a lease on one-fourth of the area covered by the permit, but not less than 160 acres at a royalty to the United States of five per cent and was given the preference of leasing the other three-fourths of the permitted area at a royalty to the United States on a step scale basis ranging from 12½ per cent to 33 1/3 per cent.

On August 21, 1935, the Congress amended the Federal Mineral Leasing Act of 1920 and virtually did away with the old permit system. Under the terms of the amendatory act any person holding an oil and gas prospecting permit that was in good standing had the right to exchange the same for an oil and gas lease for a term of five years and so long thereafter as oil and gas were produced in paying quantities at a royalty rate to the United States on a sliding scale basis ranging from 12½ per cent to 32 per cent, depending upon the average daily production per well for each month and the price of oil. The amendment also provided for the issuance of leases to the first applicant on the same basis where the lands applied for were not upon a producing structure and also for the offering at public sale of leases embracing land within a known producing structure. Under this act any individual, corporation or association could hold leases aggregating 7680 acres in any one state, but no more than 2560 acres on the same producing structure. On August 8, 1946, another amendment to the Federal Mineral Leasing Act was passed. This increased the acreage limitation to the extent that an individual, corporation, or association may now hold as much as 15,360 acres of leases upon the public domain in any one state. It also did away with the limitation as to the number of acres that could be held upon the same producing structure and, in addition, provided that any individual or corporation may hold nonrenewable options for a term of two years covering as much as 100,000 acres in the same state.

The purpose of the acreage limitation contained in the Federal Mineral Leasing Act was, of course, to prevent a few companies or individuals from monopolizing the public domain. However, it is doubtful whether it serves any real purpose and it has caused much administrative confusion.

The 1946 amendment to the Federal Mineral Leasing Act also reduced the royalty rate payable to the United States to a flat one-eighth. The leases which are currently being issued under the 1946 act are for a term of five years and so long thereafter as oil or gas is produced in paying quantities. If production is not obtained upon the leased premises during the primary term of the lease, the lease may be extended for an additional term of five years and so long thereafter as oil or gas is produced in paying quantities. However, this extension does not apply to any lands which on the expiration date of the lease are within a known producing structure and upon which oil or gas is not being produced. Any lands that are upon a known producing structure as of the expiration date of the lease but which are not actually producing may only be extended by commencing drilling operations thereon prior to the expiration date of the lease in which case the lease as to such lands will be extended for a period of two years only unless such drilling operations result in the production of oil and gas, and in such case the lease will be extended for as long thereafter as oil and gas are produced in paying quantities.

In conclusion I should like to point out that there are many other phases of the law of oil and gas that I have not touched upon as I have tried, as the subject implies, to limit this discussion to the fundamentals and to those things that the average member of the Bar, not particularly engaged in the practice of oil and gas law, is most apt to come into contact with.

Business and Law

(Continued from page 578)

ameliorate the devastating results of too low commodity prices.

The second of the two things which I believe in the long run will determine largely the extent to which business remains free, is its effectiveness in working out a workable and working system of our free enterprise representative democracy. It will be a workable system, one which does its job of providing a reasonably satisfactory life to most of us without too much stress and strain, which is our guarantee of individual freedom. It is the workable system which will protect business from governmental encroachments and restrictions that lead to strangulation. It is such a system which will prevent the placing of tyrannical power in the hands of government and ever-growing burdens on the taxpayer. These statements are vague, to be sure, but certain things emerge. If a good working device calls for a sharing of work and responsibilities between government and business, then this should be done. This might seem obvious, but there continue to be those businessmen who fight to the death to keep any bit of governmental participation out of their fields, even though the result of their success is bound to be a costly and unworkable set-up. An acknowledgment that government could handle some aspects of the problems better than private business alone would not only have preserved the legitimate field for business but would have produced a smooth-working, effective set-up.

The evolvement of a workable system will mean the accepting by business of responsibilities which in many cases it has accepted only in part before. A number of these have been referred to earlier. But through it all runs the fundamental requirement that there be a sufficiently broad sense of unity and community of interest so that the private groups, including labor, management and capital, and government and public forms of organization and regulation may work together toward the goal of greater general purchasing power, effective distribution and consequent maximum production. This broad community of interest will also lead to the development of more effective handling of the myriad types of human problems which should be disposed of smoothly in cooperation with, but in the main outside of, government.

Such a broad unity and recognition of a broad community of interest should and must lead to the adjustments between groups, business, labor, stockholders, consumers which are constantly necessary to keep consumption and production at a high level. In the main, these adjustments must be made not by unilateral action on the part of management or labor, but by negotiation and workable accord between them. Business must increase its concern for the welfare of the consumer, and labor should develop in practice a like concern. In any event, the accommodations must be worked out by those who must live with the consequences. Nothing can be more disastrous than the leaving of such decisions to public agencies or so-called public planning. The simple truth is that the public planner or public regulator is completely irresponsible because he does not have to live with and face up to the consequences of his decisions.

All this makes clear that business will require increasingly in the years to come a flexibility of viewpoint, a willingness to adjust the present-day problems, and a vision of the place and responsibility of business in our society which, I believe, a trained and experienced lawyer can supply perhaps better than many others. I have pointed out, however, that those qualities of the lawyer which give him superior value to business grow in the main, I believe, from the practice of the law rather than from law school training. This is the point which causes me to be such an enthusiastic believer in the underlying idea of the legal center. The legal center program calls for research and delving into all the broader aspects of society and our economy as they bear on the law and the lawyer. It will greatly enrich the formal training of the young lawyer and enhance to an important degree the present vitally important value which he obtains from practice. Both in personal development and accretion of broader wisdom, the legal center should be a potent force. Legal centers will be used by lawyers for keeping up to date and growing in their profession in much the same manner that medical men used clinics and clinical studies. Business will gain greatly. It needs the attributes and viewpoint of the good lawyer. His value to business will be enhanced by the legal center.

Ultraviolet in Court

(Continued from page 594)

bedded in the paper which can be seen under black light. The success of deciphering mechanical erasures depends upon the number of particles or fragments visible, their position and the presence of embossures. In a disputed deed matter, heard in the Superior Court of North Carolina, it was found possible to decipher several erased words and names because of the position of several fragments brought out with ultraviolet rays.

When subjected to black light old, faded or partially deleted writing often appears as fresh and dark as though recently written. Just as in the case of partly bleached ink writing, faded or deleted writing where it absorbs ultraviolet rays is made to appear darker.

The faint markings and fragments of faded, deleted and erased writings can be made to appear more clearly under black light by painting the opposite side of the document with a solution of salicylic acid in alcohol. This method should be first applied to a small section of the writing and used only when authorized. Still greater legibility can be obtained by using the salicylic acid solution in conjunction with photography.

Although blue-black and black inks are relatively inert under ultraviolet, *colored* writing and printing inks give a distinctive reaction and can be distinguished where their visual appearance is the same and composition different. The sensitivity of ultraviolet to even negligible variations in this respect makes it possible to detect substitutions and alterations made with a colored ink that superficially

matches an original ink.

The dyes and pigments that are used in inks, stationery, engraved and printed forms, and textiles have, by themselves, a characteristic fluorescence. The color and light reaction of dyes and pigments depends not only upon their physical and chemical nature but also their processing and solvent. Thus two identical dyes or pigments that have been processed differently or have been dissolved in different solvents will not fluoresce the same. This sensitivity of ultraviolet to dyes and pigments as well as their manufacture makes it possible to detect counterfeit currency, stationery, printed forms and stamps. Dyed hairs, cloth fragments and threads found at the scene of a crime can be identified through comparison with standard specimens.

Paper has a marked fluorescence under black light which is determined by the raw materials used, its processing and the materials used in finishing. The fluorescence of the finished paper is further affected by storage conditions, exposure and fading. Those questions regarding paper problems which can be answered through an ultraviolet examination are briefly summarized.

1. Is a questioned sheet of paper the same as a standard specimen sheet?

> If . . . the paper were strikingly unlike that upon which the genuine ones were printed, evidence of its spurious character might thus be furnished . . . the whole printing and the material on which it is found may be looked to in order to ascertain its genuineness. [*Allen* v. *The State,* 3 Humphrey (Tenn.) 366 (1842).]

2. If a sheet of paper bears the same watermark as a standard sheet, is it from the same run of paper? Has it been stored under the same conditions?

> . . . the witness declared that the . . . paper was a leaf taken from the blank book owned by the defendant. [*Caldwell* v. *State,* 28 App. 566 (1890).]

3. Has a sheet of paper been fraudulently treated to simulate age or is it as old as it purports to be?

> The paper had the appearance of age. [*Rockey's Estate,* 155 Pa. 456, (1893).]

4. Has the paper been treated with chemicals or altered in any way from its original condition?

> I want to say something about the appearance of these receipts, when they were produced they seemed unusually dirty . . . A strong suspicion arises that they were intentionally and deliberately made dirty for the purpose of giving them the appearance of genuineness. [*Levy* v. *Rust,* 49 Atl. 1017 (N. J. Eq.) (1893).]

5. Has a page of writing or typing been substituted in a series of sheets?

6. Is the paper predominantly rag or wood fibre? Is it all rag or all wood fibre?

7. Has the top or the back side of a sheet of stationery been used for writing?

8. Is the watermark impressed on a sheet of paper genuine or has it been impressed by some process? If it is spurious what method was used?

Fluorescence Indicates Composition of White Papers

White, finished papers containing a predominant amount of wood fibres tend to appear dark (deep violet) while those papers with a predominant rag content appear lighter. Pure rag or pulp papers can be distinguished from a mixture of rag and pulp where there are suitable standards for comparison. Old rag papers appear considerably lighter under ultraviolet than modern papers, which almost invariably contain some wood fibres. Any subsequent variation in the raw materials or processing of a brand of paper will alter the fluorescence. Exposure and storage conditions affect the fluorescence of paper and must be taken into account whenever an examination is made.

In papers where a dye has been incorporated the fluorescence of the dye will predominate over all other factors. A sheet of dyed wood fibre paper might appear light and a sheet of dyed rag paper dark under ultraviolet rays, which is just the opposite of that which would happen if the paper were white. Ultraviolet, while excellent for the comparison or differentiation of papers and the detection of fraudulent chemical treatment, is, because of its sensitivity to color and condition, at best only a general test for the composition of white finished papers.

Genuine old paper which has turned yellow and contains mold spots can be distinguished through black light from new paper which has been chemically treated to simulate age or wear. Fraudulently treated areas stand out, under ultraviolet, in contrast to untreated portions. The folds of artificially aged paper, where they exist, should be examined for traces of chemicals.

Examination for secret messages in invisible inks is sometimes made by the document examiner. During the time of war, mail to be censored could be examined for secret messages between the lines of writing. Correspondence entering and leaving penal institutions can be scrutinized for clandestine plans and operations written with physiological fluids or fruit juices. Ancient documents have, under black light, yielded secret recipes and chemical formulas, while old diplomatic communications have revealed interesting historical data.

Invisible inks have proved useful in marking ransom money for later identification and stationery and stamps as an aid in tracing anonymous letters.

Black light will show if letters or parcels have been opened and resealed through revealing differences in the color and intensity of fluorescence between the original adhesive or wax and the one used for resealing. A secret military communication sent through regular mail channels (as is the custom) was, while en route, reinforced over the outer flap with two strips of scotch tape. Despite the suspicious appearance of the outer envelope and fear of tampering by the recipient an ultraviolet examination showed no evidence of irregularity. Subsequent investigation disclosed that the envelope was reinforced by an alert mail clerk who noted that the flap had not been well sealed.

It is obvious that, in using instruments based upon the science of physics, we obtain a representation of things, not perceivable by the ordinary senses; for example, in looking through a magnifying glass, we are presented with details which are invisible to the naked eye. Upon the principles, then, of testimonial knowledge, can it be said that we have personal knowledge? *Wigmore on Evidence.* §795a.

Ultraviolet rays, like infrared and X-rays, are invisible to the human eye. With ultraviolet, however, it is possible to make a direct visual examination because the irradiated object emits more or less of a peculiar light or color reaction known as fluorescence. The fluorescence is generally visible, but there are cases where it is *invisible,* and like *reflected* ultraviolet rays which are also invisible, can only be recorded through the process of photography. It then follows from a legal viewpoint that both the photographs and the instrument that act as intermediary, indirect processes must be verified as accurate and trustworthy.

> . . . in case of processes using the "invisible spectrum,"—e.g. the X-ray —the process of observation may also be united with the process of communication, i.e. the rays may at the same time make visible the otherwise invisible and also by photograph register the impression. . . . The process or instrument of observation being duly testified to as trustworthy, it follows that a photograph of its images would be receivable like any other photograph. *Ibid.* §795.
>
> . . . That trustworthiness may be based upon general experience as to the class of instrument in question, together with a knowledge of the mechanism of the particular instrument as one constructed according to the trustworthy type. *Ibid.* §795a.

The special qualifications of the technical witness should be established and tested. The document examiner who claims to be an expert in the use of ultraviolet rays should be able to answer reasonable questions on the subject such as those regarding the principle of the instrument used, visible and invisible fluorescence, long and short-wave ultraviolet, ultraviolet photography, etc. The expert witness who cannot discuss these topics is obviously not well informed.

While ultraviolet findings are generally self-evident, their presentation as well as challenging in the courtroom calls for some special preparation. The lawyer should be well informed on the evidentiary applications of black light and should be familiar with some of the technical terms. In understanding the testimony of the technical witness and in the extemporaneous framing of direct and cross examination questions the lawyer must depend upon an intelligent and comprehensive knowledge of the subject. Above all, the lawyer must be on the alert for the charlatan who presumes upon the ignorance of the court.

> . . . there can be no doubt that testimony is daily received in our courts as "scientific evidence" to which it is almost profanation to apply the term: as being revolting to common sense. . . . In truth, witnesses of this description are apt to presume largely on the ignorance of their hearers. . . . Best, *Evidence.* Page 469.

The following group of questions will elicit from the technical witness (or should) pertinent information on the subject, and can be adapted either for direct or cross examination.

QUESTIONS

1. What is ultraviolet? How does it work?
2. For what purposes is it used?
3. How does ultraviolet apply to the present situation?
4. What type of ultraviolet unit did you use? Is it a long or short wave type?
5. What kind of filter was used over the lamp?
6. What is meant by fluorescence?
7. (Where photographs are produced) Did you make these photographs? What type of lens and filter was used on the camera?
8. (Cross Examination) May I see your negatives please? (Examine for retouching).
9. Why was photography utilized in this case?
10. Were these photographs made with the fluorescence or the reflected ultraviolet method? (The fluorescence method is used to photograph the *visible light* emitted by an object whereas the reflected method is used to photograph only the *invisible* rays reflected from an object.)

Classified

RATES *15 cents per word for each insertion: minimum charge $1.80* **payable in advance.** *Copy should reach us by the 1st of the month preceding month of issue. Allow two extra words for Box number. Address all replies to blind ads in care of* AMERICAN BAR ASSOCIATION JOURNAL, *1140 North Dearborn Street, Chicago 10, Illinois.*

BOOKS

LAW BOOKS, NEW, USED, BOUGHT, SOLD. JOSEPH MITCHELL, 5738 Thomas Ave., Philadelphia, Pennsylvania.

LAW LIBRARIES OR LESSER COLLECtions of esteemed used law books purchased. Our 32-page printed catalog free on request, lists some used law books we have for sale, also indicates the type of material we will purchase. CLAITOR'S BOOK STORE, Baton Rouge 2, Louisiana.

EVERYTHING IN LAW BOOKS, GEO. T. BISEL CO., Philadelphia 6, Pa.

THOMAS LAW BOOK COMPANY PUBLISHers, Dealers, Importers. We Sell, We Buy, We Exchange. In Business 65 years. 209 N. 3rd, St. Louis 2, Mo.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY, 1110—13th St., N. W., Washington, D. C.

USED LAW BOOKS AT ATTRACTIVE prices. We buy and sell either one book or a complete library. Let us quote you prices. HARRY B. LAKE, 321 Kearny Street, San Francisco, 8, California.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CLARK BOARDMAN CO., LTD., 11 Park Place, New York City.

USED LAW BOOKS BOUGHT AND SOLD. State Reports, Reporters System units, Digests Amer. Law Reports, Text-Books, Encyclopedias, etc. Correspondence solicited. R. V. BOYLE, 701 Leonhardt Bldg., Oklahoma City 2, Okla.

WHEN YOU HAVE A DOCUMENT PROBlem of any kind send for "Questioned Documents, Second Edition," 736 Pages, 340 illustrations, $12.50 delivered. Also "Questioned Document Problems, Second Edition," 546 Pages, $8.50 delivered. ALBERT S. OSBORN, 233 Broadway, New York City.

LAW BOOKS—WE CAN SUPPLY THE FOLlowing sets at this time: Air Law Review, complete set—U. S. Atty. General Ops., Vols. 1 to date—Decs. of Comm. of Patents, Vols. 1 to date—National Labor Relations, Vols. 1 to date—Federal Reporter, Vols. 1-300, 2nd Series, Vols. 1 to date, Supplement, Vols. 1 to date—Yale Law Journal, Vols. 1-25—Yale Law Journal, Vols. 1-57—Public Utilities Reports, complete set—New Hampshire Reports, Vols. 1-63 incl.—American Journal of International Law, Vols. 1 to date. Dennis & Co., Inc., 251 Main Street, Buffalo 3, N. Y.

"THE HAND OF HAUPTMANN," STORY OF Lindberg Case by Document Expert Cited by John Henry Wigmore, 368 Pages, 250 Illustrations. Price $5.00. J. V. HARING & J. H. HARING, 15 Park Row, New York 7, N. Y.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CECIL SKIPWITH, 306 West 1st Street, Los Angeles 12, California.

LAW BOOKS BOUGHT, SOLD, EXCHANGED. IRVING KOTHS, 514 Ford Building, Vancouver, Washington.

LOWEST PRICES USED LAW BOOKS—complete stocks on hand, sets and texts—Law Libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSN., 538 Dearborn St., Chicago 5, Ill.

HANDWRITING EXPERTS

EDWARD OSCAR HEINRICH, B.S., 24 CALIfornia St., San Francisco 11. Documents of any kind, any language, expertised in connection with their use as legal evidence.

Impounded documents visited throughout Pacific area.

Established 1913. Expert for American Claimants before Mixed Claims Commission, United States and Germany, 1929-1939, Black Tom and Kingsland cases, New York; see Docket Nos. 8103, 8117, et al.

Mortimer A. Heinrich, B.S., Associate, Honolulu 3.

CHARLES C. SCOTT, KANSAS CITY, MISsouri. Identification of handwriting and typewriting. Detection of alterations. Decipherment of faded and charred documents. "Photographic evidence" for court. Fully equipped laboratory. Qualified witness. Member American Society of Questioned Document Examiners. Commerce Building. Telephne VIctor 8540.

BEN GARCIA, EXAMINER OF ALL CLASSES of questioned handwriting and typewriting. 10 years of practical experience. 805 E. & C. Bldg., Denver, Colorado.

M. A. NERNBERG, EXAMINER OF DISputed Documents, Twenty-five years experience. Formerly specially employed by the United States Government as handwriting expert in cases involving handwriting. Law & Finance Building. Pittsburgh, Pa. Phone Atlantic 1-1911.

SAMUEL R. McCANN, EXAMINER OF Questioned Documents. Complete laboratory. Telephoned 5723, Yakima, Washington.

MISCELLANEOUS

COMMERCIAL LAWYERS: OUR FAMOUS "All Purpose" collection reporting form is printed with your own name at letterhead cost alone. Sample free. Write Lawyers' Press, Mayfield, Kentucky.

METAL BOOK SHELVING, STANDARD sizes or custom built to fit your needs. Trade in your bookcases and conserve space. Book carts and library ladders. Send us your specifications; we can fill them. Aluminum Shelving Corporation, 500 North 19th, St. Louis 3, Missouri. Telephone, Central 1673.

LOOKING FOR A PUBLISHER? OUR policy is to encourage new authors. If you are seeking a publisher, write for FREE BOOKLET LX. Vantage Press, 230 W. 41, N. Y. 18.

ROBES

JUDICIAL ROBES—CUSTOM TAILORED—The best of their kind—satisfaction guaranteed—Catalog J sent on request. BENTLEY & SIMON, INC., 7-9 West 36th St., New York 18, N. Y.

SHORTHAND REPORTERS

NOTICE YOUR NEW YORK DEPOSItions and interrogatories before Irwin R. Stone, Shorthand Reporter and Notary Public, 154 Nassau Street, New York 38, New York, Rector 2-0448. Member New York State and National Shorthand Reporters Associations since 1938.

POSITIONS WANTED

TAX ATTORNEY NOW WITH BUREAU OF Internal Revenue desires connection with established law firm. Ten years' experience. Box OA.